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NO. 22615

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

WILLIAM NEIL TURNBULL,	)
	)
Plaintiff-Appellant,	)
	)
vs.	)
	)
JOSEPHINE BONKOWSKI & LEONARD KING,	)
	)
Defendants-Appellees.	)

BRIEF OF PLAINTIFF-APPELLANT

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I N D E X

Page Number

Table of Cases

Statutes

Page Number

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	)
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	)
Defendants-Appellees.	)

BRIEF OF PLAINTIFF-APPELLANT

Statement of Jurisdiction

This appeal is from the United States District Court at Alaska, the Honorable James A. VonDer Heydt presiding.

The district court had jurisdiction pursuant to Chapter 85, Title 28, United States Code, Section 1332, by virtue of the diversity of citizenship of the parties--the Plaintiff being a resident of the State of Illinois and the Defendants being residents of the State of Alaska--, and the amount in controversy in the proceeding exceeded $10,000.00, exclusive of interest and costs (Complaint of the Plaintiff, paragraphs "1" through "4"; R.1).

The Court of Appeals has jurisdiction to review the judgment order of the District Court on November 17, 1967,

by virtue of the Notice of Appeal under Rule 73(b) filed by the Plaintiff on December 14, 1967 (R.50).

Statement of the Case

1. The Complaint

Plaintiff-Appellant, William Neil Turnbull, filed his Complaint on January 25, 1966, at 10:44 A.M., alleging that he sustained personal injuries, which included extensive damage to one eye, by virtue of the explosion of a rifle shell sold to him when he was a minor of the age of 11 years by the Defendant, Josephine Bonkowski, while she was in the employ of the Defendant, Leonard King; the Complaint further stated that said sale by the Defendants to the Plaintiff was in violation of a territory law and code forbidding the sale of rifle shells, gun powder, and other explosives, to a minor and imposing absolute liability for injuries sustained by the minor as a result of the sale. Damages of $150,000.00 were sought (R.3-4).

The Complaint was originally filed on said date, and at said time, in the United States District Court for the Northern District of Illinois, Eastern Division (R.3); and on August 2, 1966, the case was transferred to the United States District Court of Alaska, at Fairbanks (R.25).

2. Defendants' Motion for Summary Judgment

After the transfer and service of summons on the Defendants, the Defendants moved for summary judgment, contending that the Plaintiff was barred by the statute of limitations (R.30).

3. The Facts

Plaintiff was injured on June 15, 1956, when he was eleven years old (R.1).

Having been injured during his minority, he filed his Complaint on January 25, 1966, at 10:44 A.M. (R.1), on his twenty-first birthday; for he was born on January 25, 1945, at 1:29 P.M. (R.38).

4. The Decision of the District Judge

On November 17, 1967, the district judge, ruling that the limitation period expired on January 24, 1966, (the day before the case was filed), (R.48), granted the Defendants' motion for summary judgment "as a matter of law" (R.49).

This appeal by the Plaintiff followed.

Specification of Errors

Plaintiff-Appellant contends that the district judge erred:

1. In ruling that the time for Plaintiff to commence his litigation expired on January 24, 1966, the day before the case was filed; and
2. In granting the motion for summary judgment by the Defendants-Appellees.

ARGUMENT

I. STATUTORY DIRECTION CONTROLS THE COMPUTATION OF TIME.

Plaintiff became 19 years of age on January 25, 1964. He had until midnight on January 25, 1966, to file his action.

The sole issue in this case is whether the Plaintiff filed his action within the period of the Alaskan statute of limitations, and said issue is resolved by a determination of the date Plaintiff reached the age of 19 years. The controlling question in this determination is: in computing the time within which a thing must be done, is the day on which the initial act occurred included or excluded in counting the time?

The district judge <u>included</u> the date of Plaintiff's birth (January 25, 1945) in computing his age and ruled that he was 19 years of age on January 24, 1964. Plaintiff-Appellant contends this ruling was erroneous and that, by statutory direction (expressing legislative intent), the date of Plaintiff's birth should be <u>excluded</u> in computing his age and that he, accordingly, became 19 years of age on January 25, 1964. By the judge's ruling, it is asserted

that Plaintiff filed his action one day late; whereas, Plaintiff-Appellant contends he filed on the last day permitted pursuant to statutory direction.

Statutes Applicable

The Alaska Statutes provide, in relevant part:

1. Statute of limitations: "No persons may bring an action...for any injury to the person...unless commenced within two years". (Section 09.10.070, Alaska Statutes). (R.31).
2. Disability of a minor: "If a person entitled to bring an action...is at the time of the cause of action accrues...under the age of 19 years...the time of the disability is not a part of the time limited for the commencement of the action. But the period within which the action may be brought is not extended in any case longer than two years after the disability ceases." (Section 09.10.140 Alaska Statutes). (R.31).
3. Computation of time: "The time in which an act provided by law is required to be done is computed by excluding the first day and including

the last, unless the last day is a holiday, and then it is also excluded." (Title I, Alaska Statutes, Article 3, Section 80) (R.36). (Neither January 24 nor January 25, 1966, were holidays.)

Plaintiff submits that the statutory direction as to computation of time applies and that, accordingly, the complaint was filed within the time prescribed for commencing the action.

Mathematics

Applying the Alaska statute for computing time:

1. 19 years of age: As directed, the date of Plaintiff's birth (January 25, 1945) should be excluded and January 25, 1964, the 19th anniversary date should be included. Accordingly, Plaintiff's disability--the time he was under 19 years of age--ceased on January 25, 1964.
2. Two years after the disability ceased: As directed, the date the disability ceased (January 25, 1964) should be excluded and the date two years thereafter (January 25, 1966)

should be included in computing the time within which the action may be brought.

By reason thereof, Plaintiff had until midnight on January 25, 1966, to file his case, and he did so file his action.

By way of analogy, a person of legal age injured in Alaska on January 25, 1964, would, undeniably, be permitted until midnight on January 25, 1966, to file his action.

The computations of time for commencing an action should be identical in the instances where a minor's disability ceases as where a person is injured on the same date.

Cases Computing Time

As might be expected, cases involving the issue in the case at bar, with a statutory direction as to time computation, are rare; for, in almost all instances, the litigation is commenced in advance of the last date for filing.

(Parenthetically, Plaintiff had sought legal representation in Juneau, Alaska; had retained local counsel to commence his suit; and was of the belief his case was filed in Alaska. However, on January 24, 1966, while in Alaska and in inquiring as to the progress of his case, he was advised

by his attorney in Juneau, for the first time, that said attorney would notprosecute his claim and had not filed, and would not file, Plaintiff's case. Plaintiff, unable to retain other Alaskan counsel on said date, called by long distance the attorney for his parents in Chicago at 4:20 P.M. on Monday, January 24, 1966, and the lawsuit was filed in Chicago the following morning. This action of the attorney in Juneau who was retained by Plaintiff in failing to file the case, or to advise Plaintiff of his absence of filing, is the subject of a bar association inquiry in Alaska.)

Lowe v. Hess, 1941, DC, 10 Alaska 174, involved a determination of the time computation for the filing of mining claims. As directed by statute, the first date was excluded and the last date included.

Wade v. Dworkin, 1965, Alaska, 407 P. 2d 587, involved a determination of the time for filing an election contest and whether a Sunday is included in said time. This case is commented upon more extensively hereafter, pages "13" and "14".

II. THERE ARE NO COMMON LAW EXCEPTIONS TO THE STATUTORY DIRECTION FOR COMPUTATION OF TIME IN ALASKA.

The Minnesota decision in Nelson v. Sandkamp is contrary to Alaska law.

The District Court judge accepted Plaintiff-Appellant's recitation of the applicable statutory direction in the computation of time; however, the judge asserted a "common law exception thereto" in determining age (R.47, 48). Plaintiff submits that there is no "common law exception" in view of the statute.

The inclusion or exclusion of the day of birth in computing one's age is treated in an American Law Reports Annotation, 5 A.L.R. 2d 1143; and the difficulties, at common law, in applying various rules, and the fallacies therein, are recited in said annotation. The general common law rule is recited at page 1147 of the annotation, "Where common law prevails, one's age is computed by including the day of his birth so that a given age is attained the day before his birthday anniversary, no other method being prescribed by statute." (Emphasis added). No Alaska cases are cited in support of the "common law rule".

Cited in support of said "common law rule" is the case of Nelson v. Sandkamp, 1948, 227 Minn. 177, 34 N.W. 2d 640, 5 A.L.R. 2d 1136, and this case is the apparent basis for the trial court's ruling (R.48).

This decision in the Nelson case has not been cited by any other appellate court.

The Minnesota Supreme Court permitted the action by the plaintiff since the court ruled that the statute of limitations was tolled while the defendant departed from and resided out of the state. However, the court recited, by way of dicta, that, where the plaintiff was born on October 21, 1923, and reached his 21st anniversary on October 21, 1944:

(i) The general rule for the computation of time is to exclude the first and include the last day, p. 179;

(ii) The common law has, however, recognized an exception in computing age by including the day a person is born, even though born on the last moment thereof, p. 179;

(iii) The Minnesota Statute for time computation expresses "the general common-law rule and does not presume to abrogate the well established exception thereto governing the computation of a person's age," pp. 179, 180; and

(iv) "The prevailing rule, therefore, governs in this jurisdiction." p. 180.

Hence, the Minnesota Court said that the plaintiff therein reached 21 on October 20, 1944.

The Decision in Nelson v. Sandkamp is contrary to Alaska Law.

The statement in the Nelson case of a "common law exception" is inconsistent with the Alaska statute relating to computation of time.

Furthermore, there is a statutory direction pertaining to the applicability of common law in Alaska. This statute provides:

> Applicability of common law: So much of the common law not inconsistent with the Constitution of the State of Alaska or the Constitution of the United States or with any law passed by the Legislature of the State of Alaska is the rule of decision in this state. (Title I, Alaska Statutes, Article I, Section 10; also cited as Section 01.10.010.)

The exact question of applicability of the common law in the face of legislative intention was present in the case

of Wade v. Dworkin, 1965, Alaska, 407, P. 2d. 587, where the Alaska Supreme Court was presented with various common law holdings on the issue of whether an intervening Sunday was to be included in interpreting the "computation of time statute", (which is the same statute involved in the case at bar), where an election contest had to be filed within five days.

In the Wade case, the Alaska Supreme Court stated that, in resolving any issue relating to the "computation of time statute" and its applicability to the provision in question, "we are enjoined by the legislature to observe the provisions (of the statute)...'in the construction of the laws of the state unless such construction would be inconsistent with the manifest intent of the legislature'," 407 P. 2d P. 589, citing Laws of Alaska, Chapter 62, Section 1:

> Chapter 62, Section 1 provides:
>
> Applicability of Act: the provisions of this Act shall be observed in the construction of the laws of the state unless such construction would be inconsistent with the manifest intent of the legislature.

The Alaska Supreme Court designated the common law rule in "some jurisdictions" of excluding a Sunday if the period involved does not exceed a week, p. 589. "On the other hand, under statutes containing language similar to AS 01.10.080, it has been generally held that intervening Sundays are to be included in computing the time period even though the applicable period is less than one week," p. 590.

Therefore, after citing cases that the statute changes the common law, the court ruled, "In view of these authorities, and the language of AS 01.10.080 (the computation of time statute), we hold that in computing the five day period of limitation prescribed by AS 15.20.430 (for election contests) an intervening Sunday is to be included in the computation of the five day period provided for in AS 15.20.430. We are of the opinion that such a construction is not inconsistent with any ascertainable "manifest intent of the legislature," in regard to its enactment of AS 15.20.430 and AS 01.10.080."

Likewise, in the case at bar, no "common law exceptions" should apply to the computation of time as expressed by the legislature in enacting the statute applicable to this case;

and a construction comparable to the recitation in the Nelson case would be inconsistent to the ascertainable "manifest intent of the legislature."

III. THE RULING URGED BY APPELLANT PROVIDES UNIFORMITY IN THE LAW.

The Alaska statute for computing time compels a conclusion that, excluding the date of his birth, the Plaintiff became 19 on his nineteenth anniversary, January 25, 1964, and that until said date he was 18 and under a legal disability.

Undoubtedly, the statute was enacted to avoid any confusion, or exceptions, in the computation of time: the first day is excluded the last day included; Plaintiff became 19 on January 25, 1964.

Furthermore, there is uniformity in declaring that a person is of a particular age on the applicable anniversary date of his birth; there is no mystery in so holding and certainly custom and common usage so believe.

Questions of when one reaches voting age, can legally drink intoxicating liquors, can legally contract bindingly, can devise real estate, can commence an action in his own name, and others, all may be resolved by a holding in

accordance with the statutory direction that a person becomes of age on the anniversary date of his birth, not before.

CONCLUSION

For the foregoing reasons, we respectfully ask the Court to reverse the judgment appealed from and to remand the case with directions that Defendants' motion for summary judgment be denied and that they answer the Complaint of Plaintiff in order that the case may proceed to trial on the merits.

Respectfully submitted,

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Attorney's Certification

I certify that, in connection with the preparation of this brief, I have examined Rules 18, 19 and 39 of the United States Court of Appeals for the Ninth Circuit, and that, in my opinion, the foregoing brief is in full compliance with those rules.

Vincent J. Biskupic

Vincent J. Biskupic, Attorney

NO. 22615

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Plaintiff-Appellant,	)
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vs.	)
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JOSEPHINE BONKOWSKI and LEONARD KING,	)
	)
Defendants-Appellees.	)

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I N D E X

TABLE OF CASES

STATUTES

Computation of Time: "The time in which an act provided by law is required to be done is computed by excluding the first day and including the last, unless the last day is a holiday, and then it is also excluded." (Section 01.10.080, Alaska Statutes; C.L.A. 1933, Section 3275) 4,5,7

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	)

BRIEF OF DEFENDANTS-APPELLEES

Statement of Jurisdiction

The Defendants-Appellees adopt Plaintiff-Appellant's Statement of Jurisdiction.

Statement of the Case

The Defendants-Appellees adopt Plaintiff-Appellant's Statement of the Case as to the allegations of the complaint and the fact that summary judgment was entered by the District Judge on November 17, 1967.

Argument

I. In determining the period of disability relating to the age of a minor in Alaska, the common law rule prevails.

This is an action for personal injuries, and the applicable statutes are as follows:

First, the Alaska statute of limitations pertaining to tort actions, §09.10.070, Alaska Statutes, provides:

> "No person may bring an action ... for any injury to the person or rights of another not arising on contract ... unless commenced within two years." (Emphasis added)

At the time of the alleged injury, plaintiff was a minor, and the above statute was, therefore, tolled as provided in §09.10.140, Alaska Statutes:

> "If a person entitled to bring an action ... is at the time the cause of action accrues ... under the age of 19 years ... the time of the disability is not a part of the time limited for the commencement of the action. But the period within which the action may be brought is not extended in any case longer than two years after the disability ceases."

As stated in Plaintiff-Appellant's brief on appeal, plaintiff, William Neil Turnbull was born on January 25, 1945. The complaint in this case was filed in the Illinois Court on January 25, 1966, which was plaintiff's twenty-first birthday. Under the common law rule, which was found by the District Court Judge to be the law of Alaska, plaintiff had until midnight, January 24, 1966, to file this case in

compliance with the above statutes, as, under Alaska law, his disability was removed upon becoming 19 years of age. (See: A.S. §09.10.140).

The common law rule regarding the computation of age, simply stated, is that the day of a person's birth is included so that a given age (here 19 years) is attained on the day before his birthday anniversary. As stated in American Law Reports Annotation, 5 A.L.R.2d 1143, the origin of this rule is unknown, but its existence is shown in English cases dating back to the Seventeenth Century. The rule is evidently premised upon the fact that the law does not recognize fractions of a day, and can hardly deny "existence" on the day of birth. As stated in U. S. v. Wright, 197 F. 297, 298 (1912, 8th Circuit):

> "The law ordinarily taking no cognizance of fractions of days, one becomes of full age the first moment of the day before his twenty-first anniversary."

The logic of the rule in computing age is particularly clear when considering fractions of days since there can be no denying that any moment of birth on a given calendar day marks that entire day with absolute certainty as the first in a person's existence. There can be no reason for

exclusion of the day. As stated by the court in People v. Board of Education of City of Chicago, 343 Ill. App. 382, 99 N.E.2d 592, 594 (1951):

> "... Plaintiff admits that the law is well established that a person attains a given age on the day prior to his birthday anniversary, but argues that this was an interpretation of the law made only for the purpose of preserving the rights of the parties involved, not to destroy them. As we have stated, what is here involved is an administrative rule. Whatever may have been the historical origin of this method of determining age, it has become stare decisis now and is applied to all manner of situations." (citations omitted)

As elsewhere, this rule relating to age computation should be and is the Law of Alaska.

II. The Alaska statute relating to the computation of time within which an act must be done has no bearing on the common law rule regarding age.

Plaintiff-Appellant cites Alaska Statutes, §01.10.080, which states:

> "The time in which an act provided by law is required to be done is computed by excluding the first day and including the last, unless the last day is a holiday and then it is also excluded."

As correctly pointed out neither January 24 nor January 25, 1966, were holidays. Plaintiff maintains that this statute

should govern the computation of the time period during which plaintiff was disabled as a minor from filing his complaint in this case as provided by §09.10.140, Alaska Statutes. Defendants do not believe that this was the intent of the legislature in promulgating this statute. To so hold would be in complete derogation of the common law rule respecting age set out previously. As pointed out by the court in Lowe v. Hess, 10 Alaska 174 (1941) in interpreting Section 3275, Compiled Laws of Alaska, 1933, which is identical to the present §01.10.080, Alaska Statutes, quoted above, this section merely states the common law. How then can it be in derogation of the common law rule regarding age?

Calculation of the time of majority is not within the purview of the statute. This question was squarely dealt with by the Minnesota Supreme Court in Nelson v. Sandkamp, 34 N.W.2d 640, 642, 5 A.L.R.2d 1136 (1948), where the court states:

> "As already noted, plaintiff was born October 21, 1923, and reached his 21st anniversary on October 21, 1944. Where the common law prevails, the general rule for the computation of time is to exclude the first and include the last day. ...

For over 200 years, the common law has, however, recognized a remarkable exception to the foregoing rule, to the effect that in computing a person's age the day upon which that person was born, even though he was born on the last moment thereof, is included, and he therefore reaches his next year in age at the first moment of the day prior to the anniversary date of his birth. ... This exception has become so well established over a long period of time that it has attained an independent status of its own. Our computation-of-time statute, ..., is but declaratory of the general common-law rule. ... A declaratory or expository statute is one which has been enacted in order to put an end to a doubt as to what is the common-law--or the meaning of another statute--and which declares what it is and ever has been. Clearly, §645.15 is expressive of only the general common-law rule and does not presume to abrogate the well-established exception thereto governing the computation of a person's age. If we were to hold otherwise, the statute would be in derogation, and not merely declaratory, of the common law, and as such it would require a strict construction which would reasonably and necessarily exclude its application to the exception. ... A declaratory act is, of course, not to be confused with a remedial statute, which is intended to alter or cure a defect in an existing rule of law. ... It follows that §645.15 has no application in calculating a person's age. The prevailing rule, therefore, governs in this jurisdiction, and in computing a person's age, the day of his birth is included, and he becomes of age on the

> first instant of the day preceding his 21st anniversary. Plaintiff herein, having been born on October 21, 1923, became 21 years of age on the first moment of October 20, 1944, and consequently his disability ceased on the last moment of October 19." (citations omitted)

Clearly §01.10.080, Alaska Statutes, deals with the computation of time for the doing of an act from the happening of an event such as the occurrence of a personal injury. This is applicable to the two-year limitation; but not to a determination of when the "event" occurred. The "event" is the day (here) upon which plaintiff completed 19 years of existence, obviously the day before the celebrated 19th anniversary of his birth.

III. Some jurisdictions have held that the first day after a period of disability should be included in computing the subsequent running of a statute of limitation.

This method of computing time is covered in §4, 20 A.L.R.2d 1255. In the instant case this would mean that the first day of plaintiff's majority would be included in the two-year limitation period making the last day on which the action could be filed January 23, 1966. The reasoning for this additional shortening by one more day would seem to

be that following a period of disability, it is no longer purposeful to exclude the first day and include the last day in computing time, i.e. as for a period of limitations. This is because a person has the entire day preceding the anniversary of his majority in which to file suit, whereas, in the case of an injured adult, there may only be a fraction of the day of the injury in which to file. See: Phelan v. Douglas (1855) 11 How. Pr. 193, and Taylor v. Aetna Life Ins. Co., 49 F. Supp. 990 (1943 D.C., Texas).

Where a statute, such as the one we have in Alaska, provides for the computation of time by the exclusion of the first day and inclusion of the last, the above-noted method may not be considered applicable. It certainly should be considered, however, as convincing of the proposition that the law does not recognize fractions of days and the reasoning therefore; and, lastly, as showing how deeply entrenched in the law is the common law method of determining a person's age.

Conclusion

For the reasons set out above, Defendants-Appellees respectfully urge this Court to affirm the judgment of the District Court appealed, thereby allowing the summary judgment granted below to stand.

Respectfully submitted,

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ATTORNEY'S CERTIFICATION

I certify that, in connection with the preparation of this brief, I have examined Rules 18, 19 and 39 of the United States Court of Appeals for the Ninth Circuit, and that, in my opinion, the foregoing brief is in full compliance with those rules.

CHARLES J. CLASBY, Attorney

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REPLY BRIEF OF PLAINTIFF-APPELLANT

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REPLY BRIEF

INDEX

Table of Cases

Statutes

NO. 22615

UNITED STATES COURT OF APPEALS
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WILLIAM NEIL TURNBULL,	)
	)
Plaintiff-Appellant,	)
	)
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REPLY BRIEF OF
PLAINTIFF-APPELLANT

I. STATUTORY DIRECTION CONTROLS THE COMPUTATION OF TIME.

Contrary to the statutory directions cited by Plaintiff-Appellant, Defendants-Appellees assert that a common law exception should prevail in determining the time elapsed in computing a person's age (Br. pp.1-4). However, Defendants-Appellees concede that, in all other cases of time computations, the statutory directions cited by Plaintiff-Appellant would, and should, apply (Br. pp.4,5).

Accordingly, the issue in this case is essentially a narrow one: should a single exception be permitted to exist

for computing the lapse of time constituting a person's age in opposition to a statutory direction as to the method for time elapse computation?

Plaintiff-Appellant submits that there should be no such exception in view of the statutes enacted by the Alaska Legislature. Defendants-Appellees have completely ignored said directions in their urging of an exception, as will more fully appear herein.

II. THERE ARE NO COMMON LAW EXCEPTIONS TO THE STATUTORY DIRECTION FOR COMPUTATION OF TIME IN ALASKA.

Defendants-Appellees' responses, or lack thereof, to the application of the statutory directions, as cited by Plaintiff-Appellant, are as follows:

1. The computation of time is directed by statute:

> "The time in which an act provided by law is required to be done is computed by excluding the first day and including the last, unless the last day is a holiday, and then it is also excluded." (Title I, Alaska Statutes, Article I, Section 10; also cited as Section 01.10.080).

Defendants-Appellees admit this, but assert that this statute has no bearing on the "common law rule regarding age" (Br. p.4).

2. The applicability of common law in Alaska is directed by statute:

> Applicability of Common Law: "So much of the common law not inconsistent with the Constitution of the State of Alaska or the Constitution of the United States or with any law passed by the Legislature of the State of Alaska is the rule of decision in this state." (Title I, Alaska Statutes, Article I, Section 10; also cited as Section 01.10.010).(Emphasis added).

Defendants-Appellees made no response to said statute as related in Appellant's brief, pages 12-13; and they offered neither explanation nor reason for ignoring said direction in their urging of a "common law exception".

3. The decision in Wade v. Dworkin, 1965, Alaska, 407 P. 2d 587, dealt with the exact question of the applicability of a suggested common law interpretation in the face of legislative intent; wherein the Alaska Supreme Court was presented with various common law holdings on the issue of whether an intervening Sunday was to be included in interpreting the "computation of time statute".

Defendants-Appellees made no response to, and ignored, said decision as related in Plaintiff-Appellant's

brief, pages 12-14; and they offered no explanation as to why said decision, holding the "common law" inapplicable in view of statutory direction, should not control the case at bar.

4. Courts are enjoined by the legislature to observe the statutory direction as to "computation of time" by a further statutory enactment:

> Applicability of Act: "The provisions of this Act shall be observed in the construction of the laws of the state unless such construction would be inconsistent with the manifest intent of the legislature." (Chapter 62, Section 1, Laws of Alaska).

No response was made by Defendants-Appellees to said statute as related at page 13 of Plaintiff-Appellant's brief and recited in the Wade decision.

The decision in Nelson v. Sandkamp is contrary to Alaska law.

As initially pointed out in Plaintiff-Appellant's brief, pages 10-14, the statutory direction in Alaska pertaining to the applicability of the common law in Alaska and the Wade decision indicate that to apply the dicta in the Minnesota Nelson case would be inconsistent to the ascertainable "manifest intent of the legislature" of the State of Alaska.

Having ignored the statutes and the relevancy of the Wade case as cited by the Plaintiff-Appellant, and making no response thereto in their brief, Defendants-Appellees assert the Nelson dicta but do not comment on the distinctions thereto as related in Plaintiff-Appellant's brief, pages 12-14.

III. THE RULING URGED BY PLAINTIFF-APPELLANT PROVIDES UNIFORMITY IN THE LAW.

Recognizing the statute stating how time is to be computed (01.10.080 Alaska Statutes), but ignoring the statutes controlling the application of the contents of same, the Defendants-Appellees urge that 19 years of "time" should be computed differently than 2 years of "time" (as relates, for example, to the limitation for commencing an action) (Br. p.7). This argument by Defendants-Appellees concedes the contention by Plaintiff-Appellant that the ruling urged by him provides uniformity in the law.

The semantics endorsed by Defendants-Appellees as to "events", "acts" and "doings", to reach a strained "exception" as to the computation of the lapse of time

from a "happening", an "event", a "birth" or any other "occurrence" (Br. p.7), should be dismissed; and the passage of time should be computed uniformly, in all instances, by virtue of the statutory directions aforesaid.

IV. DEFENDANTS-APPELLEES' CITATIONS DISTINGUISHED.

The argument by Defendants-Appellees that "some jurisdictions" include "the first day after a period of disability" is completely irrelevant to the case at bar, and serves only as an attempt to cloud the issue.

Again ignoring the statutory direction in Alaska, Defendants-Appellees "suggest" an additional one day shortening in the computation of the time in which suit could be commenced (Br. pp.7 and 8). By Defendants-Appellees' own admission (Br. p.8, lines 11 and 12), such a method of shortening "may not be considered applicable"; and, of course, it is not relevant to the case at bar in view of the "computation of time" statute in Alaska (20A.L.R. 2d, 1255).

The A.L.R. annotation by Defendants-Appellees and the cases cited in support of said "suggestion" apply only in the absence of a statutory direction as to the method of computing time. In fact, this "suggestion" is

clearly recognized as a "minority" view; for the same annotation, at page 1250, recognizes the general rule (in the absence of a statute relating to time computation) that the first day is to be excluded.

The only purpose served by the aforesaid "suggestion" is to further support Plaintiff-Appellant's position that the ruling urged by him provides uniformity in the law.

The difficulties that could arise in the absence of a uniform application of time computation rules are reflected in the decision of the District Court for the Northern District of Texas, cited by Defendants-Appellees, (Br. p.8), "A year must be counted, not from the day of birth, but from the preceding day when the limitation is figured", Taylor v. Aetna Life Ins. Co., N. D. Texas, 1943, 49 F. Supp. 990, 991. There was no statutory direction in Texas; and, obviously, the statutes in Alaska would compel an opposite result in computing time.

Likewise, the Illinois Appellate Court decision cited by Defendants-Appellees, (Br. p.4), People ex rel Powell v. Board of Education, 1951, 343 Ill. App. 382, 99 N.E. 2d 592, did not involve a statutory interpretation; in fact, the decision clearly states "...what is here involved is an

administrative rule". (99 N.E. 2d 592, 594 and emphasis added.) This case involved a review by a teacher of a ruling by the Chicago Board of Education through a mandamus action where she sought to be restored to her teaching assignment. The court held that the Board of Education's rules as to when school semesters ended and when one attains retirement age applied.

Finally, Defendants-Appellees assert a "deep entrenchment" in the law of a common law method of determining a person's age; but Defendants-Appellees ignore the effect of the statutory directions and enactments, and make no response to Plaintiff-Appellant's request for uniformity.

Plaintiff-Appellant disputes Defendants-Appellees' assertion of such "deep entrenchment", and submits that, for every purpose known to mankind, the passage of time should be computed by excluding the first day of the happening and including the last. The result is the one directed by the Alaska statutes and results in uniformity.

Parenthetically, the purpose of the Statute of Limitationsto prevent stale claims is not thwarted by the ruling urged by Plaintiff-Appellant; and, obviously, there is neither inconvenience nor injury by such a holding

to the Defendants-Appellees. On the other hand, a decision upholding the lower court ruling, deprives Plaintiff-Appellant of an opportunity to pursue his claim for a serious injury.

CONCLUSION

Plaintiff-Appellant pleads for uniformity in computing time and submits that the Wade vs. Dworkin decision, dealing with the exact "computation of time" statute as in the case at bar, logically indicates that there should be no common law exceptions contrary to the statutory directions.

The judgment appealed from should be reversed and the case remanded.

Respectfully submitted,

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Attorney's Certification

I certify that, in connection with the preparation of this Reply Brief, I have examined Rules 18, 19 and 39 of the United States Court of Appeals for the Ninth Circuit, and that, in my opinion, the foregoing brief is in full compliance with those rules.

Vincent J. Biskupic

VINCENT J. BISKUPIC, Attorney

No. 22,622

IN THE

UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

ANDREW G. HOLQUIN, Appellant, -vs- FRANK A. EYMAN, Warden, Arizona State Prison, et al, Appellees.	

APPELLEES' ANSWERING BRIEF

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IN THE

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FOR THE NINTH CIRCUIT

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	)
Appellant,,	)
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-vs-	)
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	)
Appellees.	)

APPELLEES' ANSWERING BRIEF

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I N D E X

QUESTION PRESENTED

The only question of any real substance presented by appellant is whether his conviction and sentence were obtained as a result of an involuntary and coerced plea of guilty.

ARGUMENT

The United States District Court in Phoenix, Arizona, Judge William P. Copple, presiding, conducted a full and fair evidentiary hearing into substantially all the matters raised herein by the appellant on November 14, 1967. It determined that there was no merit to any of them. The court characterized almost all of appellant's assertions (i.e., those which claimed a conspiracy against appellant evidenced by "false and fraudulently prepared" minute entries and various other documents) as"completely without merit, and patently ridiculous." The appellees feel that nothing further need be said in this regard, as the record is clear that the United States District Court was right.

As to the question of "coerced plea" (supra) the

court, after the said full and fair evidentiary hearing, said "a review of the record of the State court proceedings and testimony before this court lends no support to appellant's [petitioner's] allegations. . . ."

The appellees are constrained to limit their argument in this regard also to the findings and conclusions of the court below, which were made after what the record will show was a full and fair hearing.

CONCLUSION

For the foregoing reasons, and others, this Honorable Court should affirm the order of the United States District Court in Phoenix, Arizona, denying the appellant's petition for a writ of habeas corpus.

Respectfully submitted

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AFFIDAVIT

STATE OF ARIZONA)
) ss.
COUNTY OF MARICOPA)

NORVAL C. JESPERSON, being first duly sworn upon oath, deposes and says:

I certify that, in connection with the preparation of this brief, I have examined Rules 18, 19 and 39 of the United States Court of Appeals for the Ninth Circuit, and in my opinion, the foregoing brief is in full compliance with those rules.

That I served the appellant in the foregoing case by forwarding two (2) exact copies of Appellees' Answering Brief in a sealed envelope, first-class postage prepaid, and deposited same in the United States mail addressed to:

Mr. Andrew G. Holquin
Box B-25940
Florence, Arizona

this 30 day of April, 1968.

Norval C. Jesperson

SUBSCRIBED AND SWORN to before me this 30 day of April, 1968. (SEAL)

MADELON N. HALL
Notary Public

My Commission Expires:

October 18, 1970

NO. 22623 A

IN THE UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

WILLIAM A. SPENCER,

Appellant,

vs.

UNITED STATES OF AMERICA,

Appellee.

APPELLEE'S BRIEF

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TOPICAL INDEX

TABLE OF AUTHORITIES

Constitution

Statute

NO. 22623A

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Appellee.

APPELLEE'S BRIEF

I

STATEMENT OF FACTS

Appellant [hereinafter referred to as "Spencer"], and co-defendants Herbert Lee Clark, William Watson, and Jimmie Martin were charged in Count One of a two-count indictment with conspiracy to conceal marihuana in violation of Title 21, United States Code, §176(a). Count Two charged Spencer alone with concealment of the same marihuana named in Count One. A jury trial was held before the Honorable Peirson M. Hall, United States District Judge. Spencer was found guilty on both counts, Clark and Watson were found guilty on Count One and a motion by

Martin for judgment of acquittal was granted [C. T. 2; R. T. 382-383, 633-634]. 1/ All defendants were sentenced to five years in prison. Spencer does not challenge the sufficiency of the evidence. The only question before this Court is whether the marihuana was seized as a result of an unreasonable search, in violation of the Fourth Amendment.

The shipment in question, consisting of a footlocker and a suitcase, was delivered to a United Air Lines air freight agent at the Los Angeles International Airport by two men in a car on February 23, 1967, at approximately 12:30 A. M. [R. T. 155-156]. The air freight agent weighed the shipment, filled out an air bill which listed the shipper's name and address and the consignee's name, and stated that the shipment was to be sent to the Chicago airport and held for the consignee [R. T. 157]. Subsequent testimony established that Spencer was one of the two men who delivered the shipment to United Air Lines. The two men prepaid the freight charges in cash [R. T. 158]. Another air freight agent for United Air Lines described the shipper to police officers and furnished a copy of the air bill to Sergeant Fred McKnight of the Los Angeles Police Department [R. T. 27-28]. The footlocker and suitcase were eventually brought by United Air Lines employees to the office of Robert Berklite, the senior management employee on duty [R. T. 72-73].

1/ "C. T." refers to Clerk's Transcript of Record.

"R. T." refers to Reporter's Transcript of Record.

The Los Angeles Police Department had received information from a reliable informant that marihuana was being shipped by air and rail freight in footlockers to Eastern cities, including Chicago [R. T. 46-48, 58]. A substantial quantity of marihuana had been seized as a result of this information [R. T. 48]. Sergeant McKnight prepared a police bulletin describing this practice, which contained a photograph of a footlocker [R. T. 58] and asked freight handlers to notify the police if they received suspicious shipments [R. T. 57-59, 60-61]. Copies of the bulletin were given to a Railway Express agent. The police did not distribute bulletins to air freight offices and had no discussions with United Air Lines personnel prior to the opening of Spencer's footlocker [R. T. 42-43, 59-60].

Berklite testified that the footlocker and suitcase were brought to his office after another employee had brought them to his attention [R. T. 78-79]. The employees may have taken note of this because of briefing sessions held by United Air Lines for its employees, discussing the police bulletin and distributing copies of it. Berklite wanted his staff to be aware of the possibility that the Company was shipping narcotics [R. T. 74-75]. There is no evidence of any police participation in these briefings. The footlocker was opened by Berklite pursuant to tariff regulations because it was too heavy to be household furnishings and was overweight [R. T. 44-45, 53-54]. Berklite testified that United was not directed to open footlockers by the police. They were opened as a part of United's business to inspect for tariff

regulation violations and narcotics, which were covered by regulations [R. T. 77].

Berklite had received a copy of the police bulletin in early February and had discovered a marihuana shipment one week prior to opening Spencer's footlocker [R. T. 73-74, 80]. Prior to receiving the police bulletin, it was not the practice to open footlockers, although shipments had been opened for inspection [R. T. 80-81].

Everyone agreed that the footlocker had been opened by United and marihuana discovered before the police were called by Berklite. Apparently, the trunk was opened around 1:00 A. M. Sergeant McKnight arrived at the airport between 1:30 and 2:00 A. M. and was joined by Agent Irving Swank of the Federal Bureau of Narcotics [R. T. 26, 32, 44-45, 79-82].

The footlocker and suitcase were resealed for shipment to Chicago on a United flight scheduled to arrive at 7:25 A. M. [R. T. 170-172]. Co-defendants Watson, Clark and Martin were arrested when they called for the shipment at the air freight terminal in Chicago on February 25, 1967 [R. T. 224-227].

Appellant's trial counsel conceded that the police bulletin did not tell United to open footlockers [R. T. 89] and the trial court found that there was probable cause to open the footlocker and United had a legal right to open same. The court also found that Berklite was not an agent of the police department and that the police did not authorize the opening of the footlocker or do anything other than ask to be notified.

Essentially the same issues as are presented here are before this Court in case number C. A. 22846, Clayton v. United States.

II

QUESTIONS PRESENTED

1. IS THE OPENING BY AIRLINE EMPLOYEES OF A FOOTLOCKER WHICH IS PART OF AN AIR FREIGHT SHIPMENT, WHEN NO POLICE OFFICERS ARE AWARE OF THE SEARCH, AN UNREASONABLE SEARCH UNDER THE FOURTH AMENDMENT?

2. ARE EXIGENT CIRCUMSTANCES PRESENT WHICH EXCUSED THE POLICE FROM OBTAINING A SEARCH WARRANT FOR A FOOTLOCKER PREVIOUSLY OPENED BY AIRLINE EMPLOYEES?

III

ARGUMENT

A. THE OPENING OF SPENCER'S FOOTLOCKER BY UNITED AIRLINES WAS A PRIVATE SEARCH AND THEREFORE NOT WITHIN THE FOURTH AMENDMENT, SINCE THERE WAS NO PARTICIPATION BY POLICE OFFICERS

Spencer concedes that his footlocker was opened by Robert Berklite, a United Airlines supervisor, shortly after the footlocker was deposited with United for shipment (Appellant's Brief, p. 5). United opened the footlocker in order to be certain that it was not being used as a vehicle for the shipment of marihuana. Berklite knew that tariff regulations permitted the inspection of suspicious shipments and he had received a copy of a police bulletin, which stated that marihuana was being shipped to Eastern cities in footlockers. He did not look at the bulletin before opening the shipment and did not notify the police until after he discovered marihuana.

In Hernandez v. United States, 353 F. 2d 624 (9th Cir. 1965), this Court upheld a search of luggage by an airport police officer. Airport employees had been asked to notify police if they observed persons with unusually heavy luggage bound for New York on first class tickets purchased without advance reservations. A ticket agent called Sergeant Butler of the Los Angeles Police Department after observing a person fitting the description. Sergeant Butler personally went to the storage area and searched the luggage.

Two other officers arrived and conducted a similar search and all concluded that the luggage contained marihuana. This Court held that the search was not unreasonable. In the present case, the airline employee, Berklite, did not notify police as requested. He conducted a search pursuant to tariff regulations before calling police. The search was independent of any police activity, since Sergeant McKnight, the first officer to arrive, was not even called until after the marihuana was discovered by the airline. The present case involves far less police action than this Court allowed in Hernandez. See also: Collozo v. United States, 370 F. 2d 316 (9th Cir. 1966).

The case of Gold v. United States, 378 F. 2d 588 (9th Cir. 1967), is also relevant on this question. There, Customs agents informed United Air Lines that they had reason to believe a shipment which Gold had said contained "electronic controls" had been inaccurately described. Although asked by the airline supervisor, the Customs agents refused to reveal what they suspected the true contents of the shipment to be. After the agents left the premises, the supervisor opened Gold's packages. This Court said:

> "We conclude that the initial search of the packages by the airline's employee was not a federal search, but was an independent investigation by the carrier for its own purposes. Unlike Corngold, here the agents did not request that the package be opened, and they were not present when it was opened. The agents had the same

right as any citizen to point out what they suspected to be a mislabeled shipping document, and they exercised no control over what followed. What did follow was the discretionary action of the airline's manager and was not so connected with government participation or influence as to be fairly characterized, as was the search in Corngold, as 'a federal search cast in the form of a carrier inspection.'

"While it might be expected that the carrier would not ignore the packages after being advised of the mislabeling by government agents who obviously had more than a citizen's interest in the shipment, the carrier had sufficient reasons of its own for pursuing the investigation. The manager testified that packages suspected of containing something other than what was described on the air waybill were sometimes opened so that the airline would know what was being carried on its airplanes, and so that it could assess proper charges. Despite the manager's inquiry, the government agents did not reveal what they suspected the true contents of the packages to be. His suspicions aroused, the manager had no way to determine whether the contents of the packages were fit for carriage

and properly classified except by opening them. This the carrier had the right to do under its tariffs."

378 F. 2d at 391.

In Gold, the case of Corngold v. United States, 367 F. 2d 1 (9th Cir. 1966) was distinguished. It is apparent that the determinative factor in these cases is the degree of participation by police officers in the opening of the shipment. When the opening search is made by airline employees, this Court has held that the search is reasonable even though a police officer is present. Wolf Low v. United States, 391 F. 2d 61 (9th Cir. 1968). On the other hand, when the police are on the scene, urge the airline to open the shipment and actively assist the airline employees in the opening, the search is improper.

In the only case holding that an airline search was unlawful, this Court stressed the extensive participation by Customs agents in the opening of the shipment, and emphasized facts which supported a conclusion that the search was initiated and directed by these agents with the airline employees as passive spectators. Corngold v. United States, supra. Spencer states that United States v. Wilson, 392 F. 2d 979 (9th Cir. 1968), a per curiam decision, is controlling. The brief opinion in that case did not, however, discuss the facts. Moreover, Spencer concedes that the airline employee in Wilson called San Diego police before opening the footlocker and that it was actually opened by police officers (Appellant's Brief, p. 7). In the instant case, the footlocker was

opened by United on its own initiative, in the absence of any police officer and before the police were called.

This Court should also consider the reasonableness of the conduct of the police and United Air Lines in this case. Sergeant McKnight knew that marihuana was being shipped in footlockers. Since it is obviously impractical and virtually impossible to station policemen at every point in Los Angeles where a footlocker may be deposited for shipment, he prepared a bulletin on the subject and asked that the police be notified when suspicious shipments were found. As in Gold, there was no suggestion that United or any other carrier open a shipment. United was aware of the bulletin and knew that its facilities had been used for the shipment of marihuana a week earlier. Having this in mind, United's supervisor decided to open the footlocker in accordance with tariff regulations. No police officer suggested that he open it or was even aware of the opening until after the marihuana was discovered. This Court should hold that the opening of Spencer's footlocker was a private search. Private searches are not covered by the Fourth Amendment. Burdeau v. McDowell, 256 U.S. 465 (1921); Watson v. United States, 391 F.2d 927, 928 (5th Cir. 1968); United States v. McGuire, 381 F.2d 306, 312-314 (2nd Cir. 1967), cert. denied 389 U.S. 1053 (1967); Barnes v. United States, 373 F.2d 517, 518 (5th Cir. 1967); United States v. Goldberg, 330 F.2d 30, 35 (3rd Cir. 1964); United States v. Ashby, 245 F.2d 684, 686 (5th Cir. 1957).

B. EVEN IF A POLICE SEARCH TOOK PLACE IN LOS ANGELES WHEN THE POLICE ARRIVED AT THE AIRPORT, NO WARRANT WAS REQUIRED BECAUSE OF EXIGENT CIRCUMSTANCES

When Sergeant McKnight arrived at the airport, he was shown an opened footlocker containing the marihuana. Since the search had already taken place, it would seem obvious that no warrant was necessary in order to seize contraband which had already been discovered. McKnight's actions in viewing the contents of the opened footlocker were proper, since he saw what was effectively in "plain view". Gilbert v. United States, 366 F. 2d 923, 932 (9th Cir. 1966), cert. denied, 388 U. S. 922 (1967); Chapman v. United States, 346 F. 2d 383, 385-87 (9th Cir. 1965); Caldwell v. United States, 338 F. 2d 385, 388 (8th Cir. 1964).

This Court has held that an examination of the contents of a shipment which had already been opened by an airline is not a search at all within the constitutional meaning of that term. Wolf v. United States, supra, at 63.

Assuming that a search did take place, and that it was a police search, the failure to obtain a search warrant was excused by exigent circumstances. No police officer was aware of Spencer's footlocker and its contents until Berklite called Sergeant McKnight around 1:00 A. M. on February 23, 1967. McKnight and other officers arrived at the airport between 1:00 and 2:00 A. M. They interviewed airline employees, examined an airbill and began their investigation. Apparently they assumed that their first task

as law enforcement officers was to capture the shippers and consignees of the marihuana. They may have assumed that the consignee would be expecting the shipment to arrive in Chicago on the first available flight. They acted to prevent the contraband from falling into the hands of its intended recipients by removing all but one brick from each container and replacing them with ballast. The footlocker and the suitcase were then forwarded to Chicago and officers in that city were asked to arrest whoever arrived to claim the shipment at the airport. Hindsight now establishes that co-defendants Watson, Clark and Martin did not claim the trunk until the morning of February 25, 1967, two days after shipment. The officers, however, could reasonably assume that any delay would be fatal to the investigation. A search warrant would do more than attach a legal formalism to a fact they already knew, that the footlocker contained marihuana. In order to obtain a warrant, they would have to awaken a United States Commissioner (and under the prevailing practice in the Central District of California, an Assistant United States Attorney), send an officer to obtain the warrant and return to the airport to serve it on United Air Lines. It would have been difficult to complete the search warrant procedures in the middle of the night and place the shipment aboard the first available plane. Under these circumstances, the failure to obtain a warrant should be excused. See: United States v. Rabinowitz, 339 U.S. 56 (1960); Glavin v. United States, 396 F.2d 725, 728 (9th Cir. 1968); Gilbert v. United States, supra, at 932; Boyden v. United States, 363 F.2d 551, 554 (9th Cir. 1966);

Hernandez v. United States, supra; Cipres v. United States, 343 F. 2d 95, 98, n. 9 (9th Cir. 1965); United States v. Zimmerman, 326 F. 2d 1, 4 (7th Cir. 1963).

Whenever a court is asked to sustain a search without a warrant, the standard of reasonableness is very important. This Court would be very reluctant to uphold a middle-of-the-night search of a home without a warrant, regardless of the exigent circumstances. Examination of an opened footlocker, which is part of an air freight shipment labeled "household furnishings" and which is in airline custody, should be treated differently. The Fourth Amendment has, from its very inception, been aimed at the elimination of the former, but there is no good reason for extending it to the latter.

IV

CONCLUSION

For the reasons stated in the above argument, this case should be affirmed.

Respectfully submitted,

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NO. 22624

IN THE UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

JAMES HOLLYFIELD,

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APPELLEE'S REPLY BRIEF

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TOPICAL INDEX

TABLE OF AUTHORITIES

NO. 22624

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APPELLEE'S REPLY BRIEF

I

STATEMENT OF PROCEEDINGS

On June 28, 1967, the Federal Grand Jury for the Central District of California returned an eight-count indictment naming appellant JAMES HOLLYFIELD and seven codefendants. All were named as defendants in Count One charging a conspiracy to steal mail from authorized depositories, and to use the information secured from the mails to make fraudulent withdrawals from depositors' accounts. In addition, appellant Hollyfield was named in Counts Six and Seven, charging unlawful possession of stolen mail. 1/ [C. T. 2-11]

1/ C. T. refers to Clerk's Transcript.

On November 7, 1967, a jury trial commenced before the Honorable Peirson M. Hall, United States District Judge, in which appellant Hollyfield was tried along with defendants Leroy Ray and Vincent Stafford Hill.

On November 16, 1967, the jury returned a verdict of guilty as to all defendants on all counts, including Counts One, Six and Seven, as to appellant Hollyfield [C. T. 71].

On December 11, 1967, appellant Hollyfield was committed to the custody of the Attorney General for five years on each of the three counts, with the sentence on Counts Six and Seven to run concurrently with the sentence on Count One, and with each other. Both defendants Hill and Ray were also sentenced to five years' imprisonment. [C. T. 75].

Appellant Hollyfield and defendant Ray filed notices of appeal on December 12, 1967 [C. T. 78-79]. A notice of appeal was not filed on behalf of defendant Vincent Hill.

II

STATEMENT OF FACTS

During the spring of 1967, the defendants planned a scheme to steal mail matter from the United States mails and to use the banking information contained in the stolen mail to effect fraudulent withdrawals from banking institutions.

The manner in which the scheme operated followed a consistent pattern. A letter addressed to a bank or savings and loan

association and containing either a passbook, account number, and specimen signatures, would be placed in the United States mails by a depositor [2/] [R. T. 33-34, 49, 115, 130, 133-134]. The envelope would then be stolen from the mails [R. T. 255-258], the banking information would be removed [R. T. 260-261], the rifled envelope would on occasion be returned into the mails and found in another mail box or at the Terminal Annex Post Office [R. T. 445], and, lastly, the information would be used (1) either to provide a specimen name or signature for the forging of a stolen check [R. T. 369-370, 375-376], which would be cashed at a bank [R. T. 45, 47, 268], or (2) more frequently to provide specimen signatures and the bank account numbers for fraudulent withdrawals from the account at the bank or savings and loan association [R. T. 28, 35, 52-55, 265-267].

An example of how the scheme was put into effect can be seen from the incident involving the check of one June Banks [Gov. Ex. 1]. On April 1, 1967, John Banks mailed a check in the sum of $123.59, endorsed by his wife, June Banks [Gov. Ex. 1], at a post box at Willoughby and Las Palmas in Los Angeles [R. T. 33-34]. The check was for deposit at the Bank of America, Whittier, California.

That very evening the letter and its contents were among numerous others stolen in a burglary of over ten mail boxes in Hollywood [R. T. 258]. One of the codefendants, JACQUELINE R. DUNN, was a passenger in an automobile which drove from

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2/ R. T. refers to Reporter's Transcript.

mail box to mail box in Hollywood from which numerous items were stolen [R. T. 255-259]. One CLARICE BERRYHILL was the individual who physically removed the mail from the boxes [R. T. 256].

The mail boxes were all entered with the use of a United States mail key [R. T. 256-257]. It was on October 31, 1965, that 50 such master mail keys were stolen in a burglary of the La Tijera post office in Los Angeles [R. T. 18-20]. Each of these master keys would open over 8,000 corner mail boxes in the Los Angeles area [R. T. 21].

The mail stolen on the evening of April 1, 1967, was all sorted at a location in Los Angeles and the contents of the letter mailed by Mr. Banks were among those chosen for a fraudulent attempt to obtain money from the bank [R. T. 259-261].

On April 5, 1967, after observing Clarice Berryhill in conversation with defendant Leroy Ray, Jacqueline Dunn was driven by Clarice Berryhill to the Bank of America in Whittier where June Banks had her account [R. T. 262-263]. Jacqueline Dunn had previously been trained to be a runner in the scheme by Leroy Ray. Following Ray's initial meeting with Dunn in February, 1967, she had been instructed in the manner of practicing specimen signatures to forge the signatures of various account holders, and to enter banks and pose as the account holder to obtain a withdrawal [R. T. 241-245].

Part of the scheme also required false identifications, the most prominent being California driver's licenses. It was

near the end of March, 1967, that Jacqueline Dunn was present in the apartment of Leroy Ray in Los Angeles and saw some of the paraphernalia used in making false California driver's licenses. These included numerous licenses themselves along with a rubber date stamp [Gov. Ex. 24-B], ink pads [Gov. Ex. 24, 24-A], and a United States quarter that was used to imitate the seal of the State of California on the reverse of the California driver's licenses [Gov. Ex. 24-A; R. T. 249-252]. In fact, Leroy Ray had actually made up a false driver's license for Miss Dunn shortly before that occasion [R. T. 251].

On this particular occasion at the Bank of America, Whittier, however, no false identification was used. Instead, Jacqueline Dunn arrived at the bank and after practicing a specimen signature, handed the teller, Kathleen Rosseen, a piece of paper with the name 'June Banks' on it [R. T. 264-267]. Miss Dunn, in addition, identified herself as June Banks [R. T. 266]. Unfortunately for Jacqueline Dunn, another teller working at the bank at the same time happened to be the real June Banks [R. T 36-38]. She resided in Hollywood, was employed at the Bank of America in Whittier, and happened to be banking by mail. The Whittier Police were immediately summoned and Jacqueline Dunn's attempted withdrawal was unsuccessful [R. T. 38, 267].

Another example of how the scheme operated is clearly seen in the following events in April, 1967. On the morning of April 4, 1967, a Mrs. Nathan Lipschultz placed two letters on her mail box for pickup by the mail carried [R. T. 48-49]. Each

letter was addressed to the Southern California Savings and Loan Association, 9250 Wilshire Boulevard, Beverly Hills. One letter bore her return address and contained her passbook to her savings and loan account at the institution [R. T. 49]. The other letter belonged to the sister of Mrs. Lipschultz, a Mrs. Inez Wilson [R. T. 49]. This other letter bore the return address of Mrs. Wilson and contained her passbook to the same institution [R. T. 49]. A short time after placing the letters on the mail box, Mrs. Lipschultz observed that they were not there and found that the mailman had not been to her address to effect delivery [R. T. 50]. Exactly six days later on April 10, 1967, the sum of $10,000 was withdrawn from the account of Mrs. Lipschultz at the Southern California Savings and Loan Association [R T. 52-55]. It was on April 12, 1967, only two days later, that an attempt was made to effect another $10,000 withdrawal from the association, this time from the account of Mrs. Inez Wilson [R. T. 69-72]. On this date, defendant Leroy Ray drove defendant Carroll Ellen Nutter to that institution, at which time she attempted a fraudulent withdrawal [R. T. 80]. This time, however, she was unsuccessful and left the area in an Oldsmobile driven by Leroy Ray [R. T. 97], and registered to him [Gov. Ex. 9]. The original mailing envelope [Gov. Ex. 4], and the passbook [Gov. Ex. 4-A], of the Lipschultz account were recovered incident to the arrest of defendant Vincent Hill on April 28, 1967, at 4800 August Street, Apartment 4, Los Angeles [R. T. 397-399]. Fingerprints of defendant Hill were found on the Lipschultz passbook [Gov. Ex. 4-A].

In addition, a fictitious California driver's license in the name of Inez Wilson and bearing the photograph of Carroll Ellen Nutter were recovered incident to the arrest of Leroy Herbert Ray on April 28, 1967 [R. T. 436].

In addition to the two letters containing passbooks to the Southern California Savings and Loan, Mrs. Lipschultz also mailed a letter on April 4, 1967, to Dr. S. D. Daniels, containing her check No. 435, in the amount of $94.00 [R. T. 53-54] [Gov. Ex. 5]. The original check content was recovered incident to the arrest of Vincent Hill on April 28, 1967 [R. T. 436], and two prints of defendant Hill were found on that check [R. T. 151].

An example of the use of banking information for use in forging a stolen check is found in the incident involving Mrs. Carl Cotterell. On the evening of April 13, 1967, Mrs. Cotterell observed her son mail checks with signatures and account number at a collection box at Fourth Avenue and Country Club Drive in Los Angeles [R. T. 40-41]. One day later, April 14, 1967, Jacqueline Dunn was driven by Leroy Ray to the vicinity of Crocker Citizens National Bank, Pico-Bronson Branch, Los Angeles [R. T. 268-270]. Defendant Ray gave Jacqueline Dunn a check dated April 14, 1967, in the sum of $289.50 [R. T. 267] [Gov. Ex. 3]. This was one of a series of checks that had been stolen in blank from the Neal Coffee Corporation, Los Angeles, on February 15, 1967 [R. T. 369-370]. This check bore the purported signature of Edith Cotterell [R. T. 41-42]. This was not her signature [R. T. 42] and Jacqueline Dunn was unsuccessful

in attempting to cash this forged check at the Crocker Citizens Bank [R. T. 270-272].

Another instance of the use of stolen mail to provide names and signatures for stolen checks relates to the incident involving Mr. and Mrs. Walter Jesperson. On March 20, 1967, Mr. Jesperson mailed three letters in a collection box at Mansfield and Rosewood in Los Angeles [R. T. 133-136]. These were an envelope addressed to the Los Angeles Times [Gov. Ex. 13], containing his check No. 480, and an envelope addressed to Atlantic-Richfield Company, Los Angeles [Gov. Ex. 15], containing a check No. 481 [Gov. Ex. 14-A], and a statement of the amount due [Gov. Ex. 15-B], and an envelope to Allstate Credit Corporation [Gov. Ex. 16], containing a check No. 482 [Gov. Ex. 16-A], and a statement [Gov. Ex. 16-B]. All three rifled envelopes were recovered from a different collection box located at Las Palmas and Willoughby on the morning of April 21, 1967 [R. T. 388-392, 445]. On the morning of April 29, 1967, check No. 480 [Gov. Ex. 14], which had been contained in the envelope addressed to the Los Angeles Times [Gov. Ex. 13], was recovered from the person of James Hollyfield incident to his arrest by the Los Angeles Police Department [R. T. 178]. Furthermore, James Hollyfield had on his person a check stolen in the burglary of the Fort Inn, Wilmington, California [R. T. 178] [Gov. Ex. 17]. On February 21, 1967, a substantial quantity of blank checks were stolen from the Fort Inn [R. T. 375-376]. The check that Hollyfield had on his person was now made out in the amount of $279.14,

dated April 25, 1967, and made payable to the person whose mail had been stolen on March 20th, namely, Mr. Walter Jesperson [Gov. Ex. 17]. Mr. Jesperson, of course, had no business connection with the Fort Inn and had no knowledge of the insertion of his name as payee on the stolen check. It is to be noted that an expert witness from the Scientific Investigation Detail of the Los Angeles Police Department testified that he examined the check protector imprint on this stolen check that was in Hollyfield's possession [Gov. Ex. 17], with the check protector imprint on the other stolen check that bore the endorsement of Edith Cotterell [Gov. Ex. 3], that defendant Ray had given Miss Dunn to cash at Crocker Citizens Bank on April 14, 1967 [R. T. 267], and it was his opinion that both imprints on the stolen checks were in all probability made by the same check protector [R. T. 477-478].

Another check that was found on the person of James Hollyfield incident to his arrest was one actually stolen from the mail. On April 26, 1967, Daisy Espino mailed a letter containing a check to a Bank of America branch in Huntington Park, California [R. T. 115] [Gov. Ex. 12]. This was mailed in a collection box located in front of a post office located at Florence and Compton in Los Angeles [R. T. 115]. It was only three days later that defendant Hollyfield had this check in his possession [R. T. 178].

III

QUESTIONS PRESENTED

1. Whether the trial court erred in not granting defendant's motion to dismiss the indictment and suppress the evidence on the grounds that the evidence was obtained in violation of the Fourth and Fifth Amendments to the United States Constitution.
2. Whether the trial court committed plain error by its statement relating to the quantum of evidence showing conspiracy.

IV

ARGUMENT

A. SINCE THE OFFICERS' ENTRY WAS CONSENTED TO AND SINCE THE EVIDENCE DISCOVERED INSIDE THE RESIDENCE WAS NOT THE RESULT OF A SEARCH BUT CONSTITUTED SUFFICIENT PROBABLE CAUSE FOR ARREST, APPELLANT'S ARREST AND SEARCH INCIDENT THERETO WERE LEGALLY VALID.

Subsequent to the arrest of the appellant for marihuana violations, a detailed search of his person at the police station turned up several stolen checks ultimately used as evidence at trial. Appellant contends that the court erred in denying his motion to suppress this evidence seized after arrest. Essentially

the appellant's contention appears to be that, while the search incident to the arrest was valid in itself, the arrest itself was not valid, either because it resulted from an illegal entry which tainted the subsequent observations of the police which in turn led to the arrest; and/or because the observations of the police (marihuana odor and evidence of marihuana cigarettes) provided an insufficient basis for probable cause for arrest.

1. The Police Officers' Entry Into Appellant's Residence Was Valid And Consented To.

Both arresting officers testified that they went to the appellant's residence in answer to complaints of noise from this apartment. They knocked on his door, appellant opened it and, knowing why the police were there, "he told us to come in." [R. T. 177-78, 192-94, 228]. Thus, the facts present a situation where officers are invited onto the premises, having no intent to arrest the appellant or search the area. See Thompson v. United States, 382 F. 2d 390, 393 (9th Cir. 1967); United States v. Barone, 330 F. 2d 543 (2d Cir.), cert. denied 377 U. S. 1004 (1964); Davis v. United States, 327 F. 2d 301, 303 (9th Cir. 1964). The officers, as appellant was aware, were responding to a complaint of noise and thus entered as part of their normal duties. Whether the sworn testimony of the officers -- that their entry was consented to, under no circumstances of coercion, stealth, or duress -- is to be believed was a question of fact for the trial

court. Redmon v. United States, 355 F. 2d 407, 411 (9th Cir. 1966); Davis v. United States, supra, at 304-05; United States v. Page, 302 F. 2d 81, 82-85 (9th Cir. 1962) (en banc). The determination of this fact is thus binding, unless so obviously mistaken as to be "clearly erroneous". United States v. Page, supra, at 85. See also Nelson v. People, 346 F. 2d 73, 77 (9th Cir. 1965).

2. Once Inside Defendant's Premises, The Officers Conducted No "Search".

There can hardly be doubt that once legally inside the premises, what police officers see in plain view is not to be deemed a discovery due to a "search". Ker v. California, 374 U. S. 23, 43 (1962) (brick of marihuana seen on scale in kitchen; no search); Davis v. United States, supra, (wastebasket containing marihuana seen within five feet of door; no search). See also United States v. Lefkowitz, 285 U. S. 452, 465 (1932); United States v. Lee, 274 U. S. 559 (1927); United States v. Barone, supra; People v. West, 144 Cal. App. 2d 214, 300 P. 2d 729 (1956). And such rationale is not restricted to the immediate view of the officers at the doorway. Ker v. California, supra, (evidence in kitchen through another doorway); United States v. Barone, supra, (counterfeit bills floating in toilet in adjoining bathroom; no search); Davis v. United States, supra, (marihuana found in wastebasket in adjoining bathroom).

In the present case, the officers smelled the odor of what

they determined to be marihuana upon entering the premises [R. T. 180, 198, 229-30]. Without moving, they saw the tell-tale "zig-zag" paper used to roll marihuana cigarettes [R. T. 182]. Unusually colored cigarette butts, characteristic of marihuana, were in an ashtray plainly visible in an adjoining room [R. T. 181-182]. One officer, taking only a few steps, picked up and examined one of these butts, determining it to be marihuana [R. T. 183]. At this point, the defendant was arrested [R. T. 183]. Thus, applying the relevant case law, it is evident that the officers conducted no search prior to the arrest, yet "were not required to remain blind to the obvious". Davis, supra, at 305.

3. There Was Probable Cause To Arrest Defendant For Marihuana Violations.

The arrest in this case was effected by Los Angeles police officers for violation of a California statute. The states may work out their own rules governing arrests, provided that these rules stay within the Fourth Amendment and within the rule that illegally seized evidence is inadmissible at trial. Beck v. Ohio, 379 U.S. 89, 92 (1964); Ker v. California, 374 U.S. 23, 37 (1963); United States v. DiRe, 332 U.S. 581, 589 (1948). The validity of this arrest is therefore to be determined by state law, within the bounds of the United States Constitution. Ker, supra at 37; Wartson v. United States, ___F. 2d ___ (9th Cir.) No. 21,830 August 21, 1968, Slip. Op. at 4; Dagampat v. United States,

352 F. 2d 245 (9th Cir.) cert. denied 383 U S. 950 (1965); Lipton v. United States, 348 F. 2d 591, 594 (9th Cir. 1965); Burks v. United States, 287 F. 2d 117.

California Penal Code, Section 836, provides that:

> "A peace officer may make an arrest in obedience to a warrant, or may, without a warrant, arrest a person:
>
> "1. Whenever he has reasonable cause to believe that the person to be arrested has committed a public offense in his presence.
>
> "2. Whenever he has reasonable cause to believe that the person to be arrested has committed a felony, whether or not a felony has in face been committed."

The test of reasonable cause for arrest has been stated to be whether there is,

> "more evidence for than against, so that a man of ordinary care and prudence, knowing what the arresting officer knows, would be led to believe or conscientiously entertain a strong suspicion of the accused's guilt, although reserving some possibility for doubt."

People v. Murietta, 60 Cal. Rptr. 56, 57, 251 A. C. A. 1147, 1148 (1967).

See also People v. Dabney, 59 Cal. Rptr. 243, 250 A. C. A. 1078 (1967).

"[P]robable cause [exists] . . . 'where the facts and circumstances within their [the officers'] knowledge and of which they had reasonably trustworthy information [are] sufficient in themselves to warrant a man of reasonable caution in the belief that an offense has been or is being committed.' "

Ker v. California, supra, at 35, quoting Brinegar v. United States, 338 U.S. 160, 175-176 (1949);

Carroll v. United States, 267 U.S. 132, 162 (1925).

In this case, the facts relied upon for justifying the arrest were the odor of recently burnt marihuana, and the paper used and examination of the butts from such cigarettes.

The Supreme Court of the United States has noted that,

" . . . We cannot sustain defendant's contention that odors [of narcotics] . . . cannot be evidence sufficient to constitute probable grounds for any search."

Johnson v. United States, supra, at 13;

and,

"A qualified officer's detection of the smell of mash has often been held a very strong factor in determining that probable cause exists . . . "

United States v. Ventresca, 380 U.S. 102, 111 (1965); see also Rugendorf v. United States, 376 U.S. 528 (1964).

In the present case, the officers testified to training and long experience in marihuana detection [R T. 181]. The case law supports the contention that the factual situation, viewed from the vantage of such experiencd, provided probable cause for arrest.

In People v. Lee, 260 A. C. A. 885 (1968), the police stopped a car for absence of a license plate. An officer leaned over to question the driver and detected what he determined to be marihuana smoke. Ordering defendant out of the car, he noted that defendant's pupils were dilated and his speech was slurred. These facts alone sufficed for probable cause for arrest for marihuana violations and justified search incident to arrest. Similarly, in other cases, the odor of burning marihuana and the suspect's physical appearance, judged in light of the officers' training and experience, have consistently been held to meet the probable cause standard for arrest. People v. Layne, 235 Cal. App. 2d 188, 193, 45 Cal. Rptr. 110 (1965); People v. Jefferson, 230 Cal. App. 2d 151, 40 Cal. Rptr. 715 (1964); People v. Clifton, 169 Cal. App. 2d 617, 337 P. 2d 871 (1959).

In People v. Bock Leong Chew, 142 Cal. App. 2d 400, 298 P. 2d 118 (1956), police, in the building on another matter, detected what they thought to be opium when they were passing outside defendant's apartment. Defendant's wife admitted them. The subsequent search, which turned up opium, was deemed valid. See also People v. Chong Wing Louie, 149 Cal. App. 2d 167, 307 P. 2d 929 (1957).

The odor of burning marihuana emanating from parked

cars and furtive motions of the occupants when approached, seen in light of police training and experience, have consistently been found to constitute probable cause for arrest and subsequent search incident thereto. See, e.g., People v. Sullivan, 242 Cal. App. 2d 767, 51 Cal. Rptr. 778 (1966); People v. Langley, 182 Cal. App. 2d 89, 5 Cal. Rptr. 826 (1960); People v. Tisby, 180 Cal. App. 2d 574, 5 Cal. Rptr. 614 (1960).

In People v. Sandoval, 54 Cal. Rptr. 123, 419 P. 2d 187 (1966) (en banc), cert. denied, 386 U. S. 948 (1967), the police had just arrested a woman with heroin in her possession leaving defendant's house. They knocked on the door; when the door was opened they detected a plastic bag lying in plain view on the floor inside. Their determination from outside the door that this bag contained narcotics was deemed sufficient probable cause for the arrest and search of the occupants.

It is submitted that the evidence in plain view to the officers who were legally on the premises, justified their belief that since a felony had been committed and was being committed in their presence, probable cause existed to arrest the defendant. Since the arrest was valid, the search of defendant's person, incident to the arrest was authorized by law, regardless of the fact that it turned up evidence of a crime unrelated to the one prompting the arrest. United States v. Rabinowitz, 339 U. S. 56, 60 (1950); Cotton v. United States, 371 F. 2d 385, 393-93, 394 (9th Cir. 1967); Taglavore v. United States, 291 F. 2d 262, 265 (9th Cir. 1961); Charles v. United States, 278 F. 2d 386, 389

(9th Cir. 1960). See also Davis v. United States, supra; United States v. Barone, supra.

B. THE TRIAL JUDGE DID NOT COMMIT PLAIN ERROR IN HIS STATEMENTS RELATING TO THE EXISTENCE OF A CONSPIRACY.

On Tuesday, November 14, 1967, the fourth day of trial, codefendant Deborah Saundra Karish testified on behalf of the Government. Shortly after beginning, the following took place between counsel for Hollyfield and the Court:

> "MR. MILLER: . . . Your Honor, I would like an instruction at this time on behalf of the defendant Hollyfield, I made it prior to the other witnesses, this woman testified she only recognized one defendant, any any admissions, confessions or extrajudicial context which attempts to reflect prejudicially to Mr. Hill is not to be prejudicial to my client Mr. Hollyfield. I would like the jury to be so instructed, that that testimony should only be applicable to Mr. Hill.
>
> "THE COURT: No, I won't do that. I think there is sufficient in the record at this time for a reasonable person to conclude that there was a conspiracy, and after there is a conspiracy at the appropriate time the jury will be instructed at length about the applicability of statements of one

co-conspirator against another." [R. T. 349-350].

Defense counsel in no way objected to this statement. It was quite obvious that the judge was not stating that there was, in his estimation, any guilt on the part of this defendant. Rather, the judge was ruling on the admissibility of evidence against this defendant, ruling that since the government had produced sufficient evidence of conspiracy, this evidence was relevant in light of the evidence of conspiracy. Thus, this comment, prompted by defense counsel's request, merely amounted to a ruling on evidence admissibility; in no way was defendant's complicity commented on. No defect existed sufficient to meet the standard of plain error. Federal Rules of Criminal Procedure, Rule 52(b).

Even if the judge's statement were to be construed as a comment on the evidence, it was within the wide scope allowed federal judges in this regard. See, e.g., Garrett v. United States, 382 F. 2d 768 (9th Cir. 1967); Thurmond v. United States, 377 F. 2d 448 (5th Cir. 1967); Jones v. United States, 361 F. 2d 537 (Cir. 1966); Franano v. United States, 310 F. 2d 533 (8th Cir.) cert. denied 373 U.S. 940 (1962); Petro v. United States, 210 F. 2d 49 (6th Cir. 1954), cert. denied 347 U.S. 978 (1955).

The judge instructed the jury in part that it was the sole judge of the facts, and that innocence is presumed until the Government shows defendant guilty as to each element, including conspiracy, beyond a reasonable doubt [R. T. 733-34]. The judge stated as part of an extensive instruction on conspiracy, that:

"In determining whether or not a defendant, or any other person, was a member of a conspiracy, the jury are not to consider what others may have said or done. That is to say, the membership of a defendant, or any other person, in a conspiracy must be established by the evidence in the case as to his own conduct, what he himself wilfully said or did.

"Whenever it appears beyond a reasonable doubt from the evidence in the case that a conspiracy existed, and that a defendant was one of the members, then the statements there after knowingly made and the acts there after knowingly done, by any person likewise found to be a member, may be considered by the jury as evidence in the case as to the defendant found to have been a member. . . .

"In your consideration of the evidence in the case as to the offense of conspiracy charged, you should first determine whether or not the conspiracy existed, as alleged in the indictment. If you conclude that the conspiracy did exist, you should next determine whether or not the accused willfully became a member of the conspiracy.

"If it appears beyond a reasonable doubt from the evidence in the case that the conspiracy alleged in the indictment was willfully formed, and

that the accused willfully became a member of the conspiracy either at the inception or beginning of the plan or scheme, or afterwards, and that thereafter one or more of the conspirators knowingly committed, in furtherance of some object or purpose of the conspiracy, one or more of the overt acts charged, then the success of failure of the conspiracy to accomplish the common object or purpose is immaterial." [R. T. 752, 753]

* * * * * *

"The law of the United States permits the Judge to comment to the jury on the evidence in the case. Such comments are only expressions of the Judge's opinion as to the facts, and the jury may disregard them entirely, since you as jurors are the sole judges of the facts in this case." [R. T. 762]

* * * * * *

". . . Remember at all times that you, as jurors, are at liberty to disregard all comments of the court in arriving at your own findings as to the facts." [R T. 764]

It is submitted that, far from "determining that the corpus delecti of the crime of conspiracy in Count One of the indictment has been proven beyond a reasonable doubt", [Appellant's Brief at 13] the Judge left this factual determination wholly to the jury.

Furthermore, since defendant's sentence on the conspiracy count was for a lesser time than the concurrent sentence imposed on the essentially unrelated substantive possession counts, even if the judge's comment was erroneous, it was harmless and does not constitute grounds for reversal.

Pasterchik v. United States, ___F. 2d ___ (9th Cir.) No. 21,645, September 20, 1968, Slip Op. at 9.

See also Sinclair v. United States, 277 U.S. 263, 299 (1929); Mendez v. United States, 349 F. 2d 650 (9th Cir. 1965) cert. denied 384 U.S. 1015 (1966).

CONCLUSION

For the above stated reasons the judgment of the District Court should be affirmed.

Respectfully submitted,

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NO. 22625

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FOR THE NINTH CIRCUIT

NILO M. PRADA,

Appellant,

vs.

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APPELLEE'S BRIEF

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TOPICAL INDEX

TABLE OF AUTHORITIES

Cases

Statutes

NO. 22625

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APPELLEE'S BRIEF

STATEMENT OF THE CASE

On February 1, 1967 a six-count indictment was filed against appellant [hereinafter defendant] charging him with violations of Title 21, United States Code, Section 174 and Title 26, United States Code, Section 4705(a) concealment and sale of heroin and sale of heroin without an order form. Defendant waived his right to a jury trial and was found guilty on all six counts after a one day court trial before the Honorable Manuel L. Real, United States District Judge, on March 14, 1967.

On April 10, 1967 defendant was sentenced to imprisonment for five years on each count to run concurrently. Defendant filed a notice of appeal to this court on April 14, 1967.

Throughout the trial a Spanish speaking interpreter, Lia Sunshine, was provided for defendant [R. T. 5]. [1/] The Government's first witness was Federal Bureau of Narcotics Agent Frank Figueroa who identified the defendant. Agent Figueroa testified that he saw the defendant about six times during the four-month period from the first heroin sale to the trial [R. T. 7-8]. The first sale took place on December 19, 1966 after Agent Figueroa was introduced to defendant by the informant, Vincent Ramirez. Defendant used the alias "Cano". The three men met at Pat's Doughnut Shop in Los Angeles at 5:00 p. m. for a few minutes. Agent Figueroa and Ramirez left the restaurant. At 5:30 p. m. they returned and defendant agreed to sell an ounce of heroin at 6:15 p. m. After some confusion over the meeting place, Agent Figueroa and Ramirez met defendant at the entrance to the Third and Hill Street tunnel in downtown Los Angeles. They walked into the tunnel and defendant sold an ounce of heroin to Agent Figueroa for $300.00 [R. T. 8-11].

On January 13, 1967 Agent Figueroa again met defendant at Pat's Doughnut Shop to arrange for another heroin sale [R. T. 13-14]. Later that evening they met at Sixth and Olive Streets in downtown Los Angeles and walked to an alley where defendant picked up the heroin and delivered it to Agent Figueroa in exchange for $250.00 [R. T. 14-16]. Agent Figueroa testified that all of his conversations with the defendant were in the Spanish

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1/ "R. T." refers to the Reporter's Transcript.

language [R. T. 14]. It was stipulated that the substances introduced into evidence were heroin [R. T. 34], and defendant concedes that a chain of custody was established [Appellant's Brief p. 4]. Agent Figueroa testified that he was able to identify defendant by the fact that defendant was missing the tip of his right index finger [R. T. 42, 102].

Agent Figueroa also testified that he met with defendant at Pat's Doughnut Shop on January 19, 1967 to discuss the purchase of three ounces of heroin. Defendant was arrested on the same date [R. T. 42-43].

The informant, Vincent Ramirez, testified for the prosecution. He said that he had known defendant for about five months and had seen him six or seven times [R. T. 44]. Ramirez was with defendant and Agent Figueroa on the evening of December 19, 1966 and corroborated the testimony of Agent Figueroa concerning the meetings and transfer of heroin by defendant on that date [R. T. 45-49].

Defendant first testified that he had never seen Agent Figueroa [R. T. 55]. He later stated that he saw Agent Figueroa "an hour and a half or two hours after they had arrested me" in Pat's Doughnut Shop [R. T. 56].

Defendant denied selling heroin to Agent Figueroa at any time. At the time of the first transaction on December 19, 1966 defendant said, "I must have been in my house cleaning up, washing up, because we usually eat at 6:30 or 7:00 with my wife." [R. T. 57]. On the evening of Friday, January 13, 1967 defendant

testified that he was at the home of his parents since on "all the Fridays, Saturdays and Sundays all of us in the family get together in my father's house or my parents' house and we play domino." [R. T. 58].

Defendant added that he had never seen the informant, Vincent Ramirez, and had never sold anyone any heroin [R. T. 59-61].

The defense called five relatives of the defendant in an effort to establish his alibi. Their testimony was not believed by the trial court [R. T. 112-13].

In rebuttal the Government called Federal Bureau of Narcotics Agent Irving Lipschutz who testified that he conducted the surveillance of Agent Figueroa on the dates of the transactions and on another occasion when Agent Figueroa and defendant met briefly. He also arrested defendant on January 19, 1967. At that time he took fingerprints of defendant and noted that the tip of defendant's right index finger was missing [R. T. 102]. This fact was mentioned by Agent Figueroa in his description of defendant prepared after the purchase of heroin on December 19, 1966 [R. T. 103].

The Government also introduced a certified exemplified copy of defendant's prior conviction for violation of California Health and Safety Code §11530 (possession of marihuana) [Government Exhibit 13].

ARGUMENT

THE VERDICT OF THE TRIAL COURT IS SUPPORTED BY OVERWHELMING EVIDENCE

Defendant's sole contention on this appeal is that the District Court should have acquitted him because the evidence on the question of identity was insufficient. This Court has repeatedly held that in considering the sufficiency of the evidence to sustain a conviction, the evidence must be viewed in the light most favorable to the prosecution.

White v. United States, 394 F. 2d 49, 51 (9th Cir. 1968);

Mott v. United States, 387 F. 2d 610, 612 (9th Cir. 1967);

Moody v. United States, 376 F 2d 525, 527 (9th Cir. 1967);

Enriquez v. United States, 338 F. 2d 165 (9th Cir. 1964).

Since defendant does not deny that sales of heroin to Agent Figueroa occurred on December 19, 1966 and January 13, 1967, the sole question is whether defendant was sufficiently identified as the seller. The evidence on the question of identity included the following:

1. Agent Figueroa identified defendant as the person who sold heroin to him on both dates.

2. Agent Lipschutz identified defendant as the person

he saw with Agent Figueroa at the time that Agent Figueroa testified the sales of heroin occurred.

3. Defendant admitted that he frequently visited Pat's Doughnut Shop where the negotiations for both sales took place.

4. Agent Figueroa, Agent Lipschutz and defendant testified that defendant was arrested at Pat's Doughnut Shop on January 19, 1968. Agent Figueroa explained that he went to the doughnut shop on that date to purchase three ounces of heroin from defendant, who was present when Agent Figueroa arrived.

5. Agent Figueroa and Agent Lipschutz testified that the person selling heroin was missing the tip of his right index finger. The fingerprints of defendant at the time of his arrest revealed the same characteristic.

6. Agent Figueroa testified that all conversations at the time of the heroin sales were in Spanish. An interpreter was present for defendant at the trial.

7. The informant, Vincent Ramirez, identified defendant as the man who sold heroin to Agent Figueroa in his presence on December 19, 1966.

8. Agent Lipschutz testified that Agent Figueroa met defendant on one other occasion between December 19, 1966 and January 13, 1967, the dates of the heroin sales.

9. Defendant was identified and arrested by Agent Figueroa and Agent Lipschutz on January 19, 1967, six days after the last sale and only one month after the first sale.

10. The trial identifications were made just three

months after the last transaction.

The only contrary evidence was defendant's assertion that he never saw Agent Figueroa until two hours after his arrest and did not know the informant, Vincent Ramirez. Defendant insisted that he must have been home at the time of the first sale and that he must have been playing dominoes with his family at the time of the second sale. The trial court may have disbelieved defendant's testimony in view of its inherent improbability and defendant's prior felony conviction for possession of marihuana. The testimony of defendant's relatives did not contradict the Government's witnesses since it primarily confirmed defendant's testimony that he was probably at home at the time of the first sale and must have been playing dominoes at the time of the second. None of the defense testimony was related to the dates of the heroin sales.

Defendant also called two witnesses who testified that a man named "Cano" had been in the area around Pat's Doughnut Shop. The trial court apparently accepted the Government's contention that this fact did not affect the substantial evidence introduced to establish that defendant, using the alias Cano, was the person who sold heroin to Agent Figueroa on both occasions.

The Government respectfully submits that the question of identity was established by overwhelming evidence.

CONCLUSION

For the reasons stated in the Argument, the judgment of the trial court should be affirmed.

Respectfully submitted,

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BRIEF FOR PETITIONER
PORT ANGELES TELECABLE, INC.

IN THE

United States Court of Appeals

FOR THE NINTH CIRCUIT

Case No. 22,627

PORT ANGELES TELECABLE, INC., *Petitioner*

v.

UNITED STATES OF AMERICA and
FEDERAL COMMUNICATIONS COMMISSION, *Respondents*

KVOS TELEVISION CORPORATION, *Intervenor*

On Petition for Review of Memorandum Opinion and Order of the Federal Communications Commission

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TABLE OF CONTENTS

TABLE OF AUTHORITIES

Page

STATUTES: Page

Pag

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BRIEF FOR PETITIONER PORT ANGELES TELECABLE, INC.

STATEMENT OF THE CASE

A. Jurisdictional Statement

This is a Petition for Review brought pursuant to Section 402(a) of the Communications Act of 1934, as amended, 66 Stat. 718, 47 U.S.C. § 402(a); pursuant to Section 10 of the Administrative Procedure Act of 1946, as amended, 60 Stat. 237, 5 U.S.C. § 702; pursuant to the Judicial Review

Act of 1950, as amended, 64 Stat. 1129, 28 U.S.C. § 2342; and pursuant to Rule 34 of the Rules of this Court. (R. 20 and 21).

B. Venue of the Proceeding

Petitioner, Port Angeles Telecable, Inc. of Port Angeles, Washington, a corporation organized in and operating under the laws of the State of Washington, with its principal office located in Port Angeles, Washington, the said State of Washington being within the Ninth Judicial Circuit, is subject to the venue of the Ninth Judicial Circuit pursuant to the Judicial Review Act of 1950, as amended, 60 Stat. 1129, 28 U.S.C. § 2343. (R. 21).

C. Relief Sought Below

This is a Petition for Review in which the Petitioner, Port Angeles Telecable, Inc., appeals from a Memorandum Opinion and Order of the Federal Communications Commission released January 23, 1968 (R. 0015), by which the Commission denied Petitioner's Request for Waiver (R. 0016) of the non-duplication provisions of Section 74.1103(e) of the Rules of the Commission (47 C.F.R. § 74:1103(e)), adopted March 8, 1966. (Attached to this Brief as Appendix A).

D. Introduction

Unlike AM radio signals which tend to hug the ground, television signals travel in a straight line. Because of the curvature of the earth, therefore, their normal range for good reception is limited to the horizon, usually a distance of around 70 miles. Moreover, the nature of the television signal is such that it is effectively blocked when it encounters hills or certain man-made structures.

Community antenna television (hereinafter CATV) first developed in localities where satisfactory television reception was not possible through the use of normal house top

ntennas, either because of the distance from transmitting tations or because mountainous terrain blocked the signals. he first commercial system was started about 1948.

Originally a CATV system consisted merely of an ntenna erected on a hill top and connected by cable or wire subscribing homes. Such systems are ordinarily escribed as "off-the-air" or "non-microwave" systems. here are some systems, however, which are too far from levision stations to receive the signals directly. They, herefore, rely on point-to-point microwave transmission relay the signals to them. A microwave transmitter tilizes a portion of the spectrum and therefore requires license from the Federal Communications Commission.

The CATV system in the instant case is a non-microwave stem, and all the signals which it carries are received rectly off the air from the television stations without use the spectrum. All of the signals can be received by the habitants of Port Angeles, Washington, with the use of oof-top antennas without resort to Petitioner's CATV stem. However, all television signals except the signal KVOS-TV can be viewed less well in certain sections of ort Angeles with the use of roof-top antennas because the Olympic Mountain range which severely impedes the ception of television signals from all United States tations except Television Station KVOS, Bellingham, ashington. (R. 0002). This means that the picture ailability of these other United States stations can be iproved generally for subscribers to Petitioner's CATV stem, because the antenna of the CATV system is placed a high elevation.

The history of the Federal Communications Commission's view of its authority over CATV systems is a ronicle of vacillation and contradiction. In 1959, approximately a decade after the advent of CATV operations, e Commission first considered the question and concluded at it was without such authority—whether the CATV

systems were "off-the-air" or fed by microwave. *CAT and TV Repeater Services,* 26 F.C.C. 403 (1959). C April 23, 1965, the Commission reversed its position wi respect to CATV fed by microwave and asserted jurisdi tion over such systems. *First Report and Order,* 38 F.C. 683 (1965). On March 8, 1966, the Commission complete reversed its earlier position and asserted authority ov non-microwave CATV systems also. *Second Report a Order,* 2 F.C.C. 2d 725 (1966).

This, in brief, is the record of the Commission's vie of its authority to regulate CATV. A more detailed stat ment of these successive positions and the bases relied up by the Commission is set forth below.

When the Commission first considered the question 1959, it expressly concluded that it had no power to regula CATV systems. In reaching this conclusion it considere among other arguments, the contention that it derived su regulatory authority over microwave CATV systems a should exercise it because of

> . . . the impact upon a television broadcaster of gra of radio facilities to a communications common carri where the common carrier facilities will be used for t purpose of providing communications service to a co munity antenna system operating in competition wi the broadcaster.

The Commission dismissed the contention as follows:

> In essence, the broadcasters' position shakes down the fundamental proposition that they wish us regulate in a manner favorable toward them vis-a-v any non-broadcast competitive enterprise. Thus, f example, we might logically be requested to invoke prohibition against access to common carrier faciliti by such enterprises as closed-circuit music and ne services, closed-circuit theater television operato and, possible, even ordinary motion picture a legitimate stage operators, magazine and newspap publishers, etc., comprising all of the entities whi

compete with broadcasting for the time and attention of potential viewers and listeners. *The logical absurdity of such a position requires no elaboration.* (26 F.C.C. at 431-32 (emphasis added)).

This view of the matter was not long-lived. In 1962 the ommission, on the basis of a protest initiated by a local levision station, denied an application of a common rrier by radio for permission to construct a microwave dio communications system to be used to transmit tele- sion signals to CATV systems serving three towns in yoming. It concluded that grant of the application would t serve the public interest because it would result "in te demise of the local television station and the eventual ss of service" to certain residents of the area which uld not be reached by CATV. However, the denial was ued without prejudice to refiling of the application if could be shown that the CATV operation would not plicate the programs carried by the local television tion and would also carry the signals of the local broad- sters. In reaching its conclusion, the Commission stated: To the extent that this decision departs from our views the Report and Order in Docket No. 12443, 26 F.C.C. 3 (released April 14, 1959), those views are modified." *rter Mountain Transmission Corp.*, 32 F.C.C. 459, 465 962), *aff'd sub nom. Carter Mountain Transmission Corration* v. *FCC*, 321 F.2d 359 (D.C. Cir.), *cert. denied*, 35 U.S. 951 (1963). Thus the Commission took the first p in effectuating a program—which it had earlier jected as a "logical absurdity"—of protecting broad- sters against the economic competition of CATV.

The second step was to translate the action it had taken *Carter Mountain* into general rules. This was done on ril 23, 1965, when it released its *First Report and Order*, F.C.C. 683 (1965). There the Commission also stated t it had:

> . . . determined as an initial matter that the Communications Act vests in this agency appropriate rule

making authority over all CATV systems, includi
those which do not use microwave relay service (
so-called "off-the-air systems"). *Ibid.* at 684.

However, at that time it limited its asserted authority o
microwave CATV systems and deferred action with resp
to off-the-air CATV systems. Further, it simultaneou
issued a Notice of Inquiry and a Notice of Proposed R
Making[1] in order to develop "an appropriate recor
and to meet its "need for more definitive informatio
Ibid. at 685.

In the *First Report and Order* the Commission arti
lated its "belief that CATV service should supplement,
not replace, off-the-air television service." Ibid. at 7
The Commission asserted that duplication of broadc
program material by CATV systems in a local market fr
distant sources dilutes such audiences and is not "a fa
method of competition" or "consistent with CAT
appropriate role as a supplementary service." Ibid.
order "to create reasonably fair and open conditions
competition between CATV and broadcasting stations .
[and] to ameliorate the adverse impact of CATV c
petition upon local stations," the Commission adopted r
requiring microwave CATV systems to carry the sig
of local television broadcasters and imposed "reasona
carriage and non-duplication requirements." Ibid. at 3
714.

The next step was the adoption of the *Second Report*
Order on March 4, 1966, 2 F.C.C. 2d 725 (1966).[2] The C

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[1] 1 F.C.C. 2d 453 (1965). There was attached to the document a "
mission's Memorandum On Its Jurisdiction and Authority", which
cluded that ". . . the Commission presently has jurisdiction over all C
systems, whether microwave is used or not." Ibid. at 478-482. This m
randum was also appended to the Second Report and Order.

[2] The Second Report and Order was modified in minor respects by M
randum Opinions and Orders adopted on April 20, 1966, 3 F.C.C. 2d
(1966), and January 5, 1967, FCC 67-34.

mission modified its earlier issued rules and made them applicable to all CATV systems—whether microwave or non-microwave.

In essence, the *Second Report and Order* and the rules adopted therein regulate and limit the operation of CATV systems in three major respects. First, the "Compulsory Carriage" rules provide that CATV systems are required to carry the signals of local and nearby television stations if requested. Second, the "Exclusivity" rules provide that a television station with a stronger signal over the CATV community may prevent the system from carrying on the same day those programs of another station with a weaker signal which duplicate its programs.[3] Third, the "Top 100 Market" rules provide that in the markets so designated CATV systems may not, without Commission authorization, carry the signals of television broadcast stations unless such stations place a signal of Grade B strength over the community serviced by the CATV system.[4]

The foregoing history spells out the sharp change between 1959 and 1965 in the Commission's view of its authority to regulate CATV. It should, however, be pointed out that during that period the Commission

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[3] The Commission rules governing television broadcast stations recognize three grades of signal strength—Principal City Grade, Grade A and Grade B. These grades are defined in terms of the level of signal intensity which is required to provide an acceptable signal to 90% of the locations for the following percentages of time: Principal City Grade—90%; Grade A—70%; Grade B—50%.

[4] Section 74.1101, et seq. of the Commission's Regulations. 47 C.F.R. § 74.1101, *et seq.* (1967).

repeatedly sought, but Congress did not enact, authorizing legislation dealing specifically with CATV.[5]

E. The Proceedings Here Involved

Petitioner is the operator of a community antenna tele vision system (hereinafter CATV)[6] in Port Angeles Washington. (R. 0001). Petitioner's CATV system com menced operations in May of 1960. (R. 21). At that time the Commission had not attempted to exercise jurisdiction over CATV systems and had actually refused to regulate them. (R. 21). In the year before Petitioner began the operation of its CATV system, the Commission had decided unanimously that it did not possess jurisdiction to regulate CATV systems directly. (R. 21 and 22). It stated a reason for its decision (refusing to regulate CATV

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[5] The history of these attempts is set out in a footnote contained in th Notice of Inquiry and Notice of Proposed Rule Making, *supra*, note 1, a **464, n. 13:**

> Following the Report and Order in Docket No. 12443, supra, the Com mission recommended that the Congress amend the Communications Ac to require CATV systems to obtain the consent of the stations whos signals they transmit, and to carry the signal of the local station (with out degradation) upon request. These proposals were embodied i S. 1801 and H.R. 6748, introduced in the 86th Congress, including S 2653 (providing for the licensing of CATV systems) and S. 2303 (pro viding for the issuance of certificates of convenience and necessity). Th Communications Subcommittee of the Senate Committee on Interstate an Foreign Commerce reported favorably on S. 2653. S. Rept. 923, 86t Cong., 1st Sess. In 1960, following two days of debate on the floor o the Senate (106 Cong. Rec. 10326, 10344, 10407 and 10520), S. 2653 wa recommitted to the Committee on Interstate and Foreign Commerce b one vote, 106 Cong. Rec. 10547. As a result, no legislation relating t CATV systems was enacted in the 86th Congress. In the 87th Congres the Commission proposed S. 1044 and H.R. 6840, which would hav expressly authorized the Commission to issue rules for the protection o stations providing locally-originated television programs. These bil received no action. The Commission proposed no legislation to the 88t Congress, and no action was taken on any bills.

[6] The operation of CATV systems has been described in detail in *Clark burg Publishing Co.* v. *Federal Communications Commission*, 225 F. 2d 5 (D.C. Cir. 1955) and *Lilly* v. *United States*, 238 F. 2d 586 (4th Cir. 1956).

systems) which is still valid today. The Commission stated:

> "59. We have no doubt that, as the broadcasters urge, CATV's are related to interstate transmission (regardless of where the station retransmitter is located, the signal often originates, via network, in New York or elsewhere). Therefore it appeared to us there is no question as to the power of Congress to regulate CATV's, or give the Commission jurisdiction to do so, if it desires. But, as an administrative agency created by Congress, we are of course limited by the terms of the organic statute under which we were created, and must look to that statute to find the extent of our jurisdiction and authority."[7] (R. 22).

The Commission from 1960 to this day recommended several bills to the Congress which would have given the authority to the Commission to regulate CATV systems and accompanied the request for submission of these bills with the statement that the Commission needed this authority, but the bills have not been enacted into law. (R. 22).

Under the jurisdictional posture of the Commission prevailing in 1960, Petitioner obtained a local franchise to provide CATV service to Clallam County, Washington. Petitioner is currently providing such service to the viewers of the community of Port Angeles, Washington, and its surrounding suburbs. (R. 0001 and R. 22). The population of Clallam County is approximately 35,000. Port Angeles has a population of approximately 15,000. Petitioner's CATV system serves about 3,000 subscribers.[8] (R. 0001, 0002, R. 22 and 23).

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[7] In the Matter of Inquiry into the Impact of Community Antenna Systems, etc. on the Orderly Development of Television Broadcasting, Docket No. 12443, Report and Order No. FCC 59-292, 24 Fed. Reg. 30004, 18 Pike & Fischer Radio Reg. 1573 (1959); 26 FCC 403 Par. 59. See also, Pars. 62, 64, 69 and 70 of the same document.

[8] FCC Memorandum Opinion and Order in this matter, released January 23, 1968, page 1, para. 1. (R. 0015).

The Port Angeles Telecable, Inc. CATV system supplies its subscribers with the signals of the following television stations:

Call Sign	Channel	Network	Location
CBUT-TV	2	CBS	Vancouver, British Columbia
KOMO-TV	4	ABC	Seattle, Washington
KING-TV	5	NBC	Seattle, Washington
CHEK-TV	6	CBS	Victoria, British Columbia
KIRO-TV	7	CBS	Seattle, Washington
CHAN-TV	8	CTV	Vancouver, British Columbia
KCTS-TV	9	Educational	Seattle, Washington
KVOS-TV	12	CBS	Bellingham, Washington (R. 0002 & R. 23)

The city of Port Angeles is located on the Straits of Juan de Fuca which is 17 miles south of Victoria, British Columbia. This community is on the Olympic Peninsula surrounded on the north and northeast by water (Straits of Juan de Fuca), and on the south and west by the Olympic Mountain Range which severely impedes the reception of television signals from all United States stations except Station KVOS, Bellingham, Washington. This is because Bellingham, which is a greater distance from Port Angeles than Seattle (R. 0002, R. 23) transmits its signal over the Straits of Juan de Fuca to said community. "Spotty" television reception caused Petitioner to select an antenna site so as to insure that its subscribers receive high quality reception from all television channels available in the Port Angeles area, especially the Seattle stations. (R. 0003 and R. 23).

In the Spring of 1966, six years after Petitioner's CATV system began operations in Port Angeles, the FCC assumed regulatory jurisdiction over the entire CATV industry and published certain Rules and Regulations in the Federal Register which it adopted as the *Second Report and Order*.[9] The *Second Report and Order* was adopted by the Commission after voluminous comments were filed by both representatives of the broadcasting industry and the

[9] 2 FCC 2d 725 (1966).

CATV industry during the pendency of the rulemaking proceeding. (R. 24).

Port Angeles Telecable, Inc. is a member of the National Cable Television Association, Inc. (formerly called National Community Television Association, Inc.), of Washington, D. C. The National Cable Television Association, Inc. (hereinafter NCTA), the only national trade association for CATV members and associate members, filed voluminous comments on behalf of its members, including Petitioner, in the aforesaid rulemaking proceeding. These comments challenged the jurisdiction of the Commission to regulate CATV systems, because neither the Communications Act of 1934, as amended, nor any other law grants to it such authority either expressly or impliedly, and NCTA challenged the proposed regulations as arbitrary and capricious and as violative *inter alia* of the due process clause of the Fifth Amendment to the Constitution of the United States. Nevertheless, the Commission adhered to its said Rules and Regulations. These legal challenges are now pending in cases in the Circuit Court of (R. 24) Appeals for the Eighth Circuit [10] and some of the issues are being reviewed in the Supreme Court of the United States on certiorari from a decision of this Court.[11] (R. 25).

Pursuant to the said *Second Report and Order,* Television Station KVOS-TV, Bellingham, Washington, has requested non-duplication protection under Section 74.1103 (e) of the Commission's Rules.[12] On September 14, 1966,

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[10] *Black Hills Video Corporation and Midwest Video Corporation, Petitioners* v. *United States of America and Federal Communications Commission* (Case No. 18,052).

[11] *Southwestern Cable Co., et al.* v. *United States of America and Federal Communications Commission* (378 F. 2d 118—C.A. 9, 1967).

[12] 47 C.F.R. § 74.1103; *United States of America and Federal Communications Commission* v. *Southwestern Cable Co., et al.* (Case No. 363), on certiorari to the Supreme Court of the United States (Oct. Term 1968).

Petitioner, through its CATV system manager, Mr. Jack B. Chapman filed a Petition For Waiver with the Commission dated September 7, 1966, pursuant to Section 74.1109 of said Rules. (R. 0001-0008, R. 25).

After outlining the facts and statistics pertaining to Petitioner's operation, as narrated above, the said Petition For Waiver stated that compliance with the request by KVOS-TV would require the Petitioner to delete at least substantial portions of the programming of Television Station KIRO-TV, Seattle, Washington, and would possibly result in totally deleting the programs of this Seattle station from its system. (R. 0003 and R. 25).

Petitioner pointed out that a grant by the Commission of its Petition For Waiver would not adversely affect Television Station KVOS-TV. (R. 0005). In support of this conclusion, Petitioner stressed the following facts.

The contours of Station KVOS in Bellingham are very unique and provide said licensee with the best of both possible worlds. This station (R. 0004 and R. 25) provides a Grade A signal to Vancouver, British Columbia; Victoria, British Columbia; and its Grade A signal falls just north of Seattle. Seattle, is, however, within its Grade B contour. Its non-network advertisements and non-network programming, for the most part, cater to advertisers and listeners within its Canadian coverage. Geographical factors are such that it has an extremely choice coverage contour, which should not prejudice the subscribers of the Port Angeles CATV system who enjoy, desire and are dependent upon the signals from the Seattle stations, especially KIRO-TV. (R. 0004 and R. 26).

Petitioner stated KVOS would not be prejudiced against should the Commission grant the waiver request. (R. 0005 and R. 26).

KVOS-TV serves both Vancouver, British Columbia and Bellingham, Washington. This is understandable; KVOS serves a potential of 368,200 television households in

British Columbia and only 145,700 such households in the United States. The Canadian Bureau of Broadcast Management credits KVOS-TV with a "station reach" of 268,100 homes, whereas the American Research Bureau credits KVOS-TV with an average daily circulation of 34,500 homes in the United States. The network base hourly rate of KVOS-TV is only $300.00, whereas its Class AA rate is $650.00, which is obviously attributable to KVOS-TV's substantial Canadian audience. All of this information is recited in the 1966 edition of *Television Factbook*. (R. 0005 and R. 26).

Petitioner brought to the attention of the Commission the fact that the community of Port Angeles is a Seattle suburb and not a Bellingham suburb. Port Angeles is 63 miles from Bellingham and only 60 miles from Seattle. However, to travel from Port Angeles to Bellingham encompasses a trip of approximately 170 miles. An individual traveling by automobile from Port Angeles must cross one toll bridge (R. 0003 and R. 27), take a ferry across a body of water and drive 94 miles to reach Bellingham. This trip consumes approximately 3½ hours. A trip from Port Angeles to Seattle takes only about two hours. The proximity of Seattle to Port Angeles has caused the citizens therein to become dependent upon Seattle in all regards. Seattle advertisers cater to the Port Angeles market; such is not the case as concerns retailers in the Bellingham area. A cursory glance at any map reveals the closer geographical proximity of Seattle *vis-a-vis* Bellingham to Port Angeles. (R. 0004 and R. 27).

The Petition For Waiver pointed out the inconsistencies in the Commission's Rules if they were applied to the prevailing situation in Port Angeles. The Rules would work to the benefit of three Canadian television stations (CBUT, CHEK and CHAN) (R. 0005 and R. 27), which could advertise on their channel and be heard and seen by the subscribers of the CATV system, but KIRO-TV and KING-TV, of Seattle, Washington, would be blacked out when

KVOS-TV would use the same programs as KIRO and KING within a twenty-four hour period, and the advertisements from Seattle could not then reach Petitioner's CATV subscribers. (R. 0005, 0006 and R. 27).

Petitioner did not ask for relief only for its subscribers, but it pointed out that the Rules were detrimental to the community of Port Angeles. (R. 0006 and R. 28). This was obvious from the fact that merchants in Seattle, which is much more readily accessible to the inhabitants of Port Angeles than Bellingham (R. 0003, 0004), cannot advertise their goods in Port Angeles, because certain programs containing these advertisements are blacked out by Commission fiat, while the Bellingham station's programs and advertising, which cater more to the Canadian markets, can be shown on the Port Angeles CATV system. Thus, the citizens of Port Angeles are deprived of the benefit of advertisements originating from Seattle. (R. 28).

The Commission summarily denied Petitioner's Petition For Waiver on January 23, 1968 (R. 0015-R. 0018). Petitioner duly filed before this Court a Petition For Review as stated in the Jurisdictional Statement, *supra*.

F. Questions Presented

The questions presented which will be argued in detail in this Brief are as follows:

1. Does the Federal Communications Commission have statutory authority to issue rules, regulations and orders with respect to CATV systems which are not served by microwave and which, accordingly, make no use of the radio spectrum?

2. If the Commission does possess such authority, can it deprive the viewing public of its right to select the television programs of its choice through general rules adopted upon the mere conjecture and without proof that a CATV system will have an adverse

economic impact upon television stations to the extent that the public interest will be adversely affected?

3. Can the Commission deny a Petition For Waiver of its non-duplication rules based upon allegations supported by affidavit of Petitioner without a hearing, when the allegations are simply contradicted by an Opposition not accompanied by an affidavit as required by the Commission's Rules?

4. Can the Commission apply its rules to a pre-existing CATV system, which has relied upon the Commission's repeated declarations that it had no jurisdiction over it, in a way that changes its business practices and threatens its continued existence?

5. Can the Commission's rules arbitrarily discriminate between CATV subscribers and the general public in prohibiting the CATV subscribers only from viewing certain television programs available to all in the CATV community?

6. Can the Commission's rules prohibit advertising from distant stations to be received in the CATV community without violating the antitrust laws?

7. Can the Commission impose upon a non-licensee CATV operator the restrictions imposed upon its licensees while simultaneously denying to the CATV operator the procedural protections of Section 309(e) of the Communications Act because he is a non-licensee?

. Specification of Errors

1. The Commission's attempt to regulate Petitioner, a ATV system not served by microwave, was issued with-ut statutory authority.

2. The Commission summarily disposed of Petitioner's rguments claiming that its contentions were "largely con-

clusionary in nature."[13] (R. 0015, para 2, and R. 28) To the contrary, Petitioner's CATV system manager, Mr Jack B. Chapman, accompanied the pleading with an affidavit to the effect that he had "reviewed the foregoing petition for waiver and states that the facts therein othe than those which may be officially noticed, are based upon his personal knowledge and are true and correct." (R. 0007 and R. 28). The Commission in its Memorandum Opinion and Order does not point to contrary statements under oath or to facts which contradict the claims in Mr Chapman's affidavit. (R. 0015-R. 0017). As stated to the Federal Commmnications Commission by the United States Circuit Court for the First Circuit in the case of *Presque Isle TV Co., Inc. et al.* v. *United States of America and Federal Communications Commission* (Case No. 6896 (R. 28), in a decision rendered on December 18, 1967 "there was no justifiable basis for the Commission sweeping them aside with a part of one sentence." (R. 29 (*Presque Isle TV Co., Inc. et al.* v. *United States of America and F.C.C.*, ...F.2d ..., 1st Cir. 1967).

In that case, the Petitioner had filed affidavits with reference to the signal strength of television stations and pertaining to economic impact and the Commission had simply stated, in effect, as in this case, that it was not convinced, despite the fact the testimony was uncontradicted. In the instant case, likewise, KVOS did not show how or to what extent it would be injured financially by Petitioner's carrying the Seattle stations' programs. (R. 2 R. 0009-0013).

The Rules of the Federal Communications Commissio (§ 74.1109) provide that comments or opposition (such as that filed by Intervenor, KVOS Television Corporatio R. 0009-R. 0014) to a petition (such as that filed by Pe

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13 Memorandum Opinion and Order released January 23, 1968, page 1, pa 2 (R. 0015).

tioner (R. 0001-R. 0008) before that Commission "shall contain a detailed full showing, supported by affidavit, of any facts or considerations relied upon". The Commission's Rule § 74.1109(c)(2)(d) states:

> Interested persons may submit comments or opposition to the petition within thirty (30) days after it has been filed. Upon good cause shown in the petition, the Commission may, by letter or telegram to known interested persons, specify a shorter time for such submissions. Comments or oppositions shall be served on petitioner and on all persons listed in petitioner's affidavit of service, and shall contain a detailed full showing, supported by affidavit, of any facts or considerations relied upon." [14]

Intervenor's, KVOS's, opposition did not contain the required detailed full showing and it was not supported by an affidavit,[14] although Petitioner's Petition For Waiver filed with the Commission was supported by the affidavit (R. 0007) required by the Commission's Rules (§ 74.1109 (c)(1).[15]

Still this did not phase the Commission nor deter it from disregarding the facts and considerations contained in Petitioner's Petition For Waiver and making a finding based upon allegations made by Intervenor in its Opposition To Petition For Waiver. The Commission disregarded the facts and allegations supported by Petitioner's affidavit and based its findings upon Intervenor's allegations and conclusions which were not supported by affidavit as required by the Commission's Rules. This does not constitute a finding by the Commission upon the facts in the record.

In fact, the Commission's decision appears to be merely a synthesis of the Intervenor's Opposition To Petition For

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[14] The nearest attempt to supporting its allegations was made by KVOS by incorporating by reference irrelevant affidavits filed in an entirely different case not involving Petitioner (R. 0011 and R. 0012). This fails to comply with § 74.1109(c)(2), *supra*.

[15] 47 C.F.R. § 74.1109, *et seq.* (1967).

Waiver. The Memorandum Opinion and Order of the Commission simply paraphrases Intervenor's uncorroborated Opposition. The following comparison of the salient points in the Commission's Memorandum Opinion and Order with the main points in Intervenor's Opposition makes this conclusion inevitable.

KVOS' Opposition to Petition for Waiver (R. 0009-0014) (Emphasis added)	*FCC's Memorandum Opinion and Order* (R. 0015-0018) (Emphasis added)
1. So far as the public is concerned, it is immaterial whether the network programs it views are those of KIRO-TV or KVOS-TV (R. 0010).	It makes no real difference to the cable subscribers whether they watch CBS programming on the channel allocated to KVOS rather than on the one alloted to KIRO. (R. 0015 and 0016).
2. In support of its request to be relieved of the requirement that it afford non-duplication protection to KVOS, Port Angeles Telecable agrees that (a) the community of Port Angeles is more closely identified with Seattle than with Bellingham; (b) KVOS-TV has unique advantages; and (c) KVOS-TV would not be prejudiced should the Commission grant Port Angeles Telecable's waiver request.	In support of its waiver request, Port Angeles Telecable argues that Port Angeles has a greater community of interest with Seattle than with Bellingham; that KVOS-TV would not be prejudiced by a grant of the waiver. *These contentions are largely conclusionary in nature.* No facts are alleged in support of the claims that the people of Port Angeles are "dependent upon Seattle in all regards" and that "Seattle advertisers cater to the Port Angeles market" while Seattle retailers do not. *But even* if true, these arguments are not persuasive (R. 0015, para. 2).
3. Not only has Port Angeles Telecable failed to provide factual support for those claims, but *it has totally failed to show that such considerations, even if true, would warrant a departure from the Commission's non-duplication requirements as*	Our *Second Report and Order* in Docket Nos. 14895 et al., 2 FCC 2d 725, found, for reasons there stated, that stations in this situation are entitled to limited protection of the program exclusivity for which they have bargained through the deletion of more distant programs

KOS' Opposition to Petition for Waiver (R. 0009-0014) (Emphasis added)

et forth in Rule 74.1103 (R. 010). . . . There is no under- ying factual support for Port ngeles Telecable's *conclu- ionary statements.* (R. 0011).

4. Port Angeles Telecable makes point of the fact that VOS-TV provides television ervice to persons in Canada s well as to the United States itizens whom it is licensed to erve. The short answer to his contention is that KVOS- V is a fully American sta- ion which fully meets its re- ponsibilities to serve the eeds and interests of the Jnited States viewing public ithin its service area. (R. 011). . . . Port Angeles Tele- able's final argument in sup- ort of its waiver request is hat KVOS-TV would not be rejudiced by a grant of its etition. *Port Angeles Tele- able's suggestion that KVOS- V has sufficient coverage so hat incursion into its United tates revenues can be over- ooked must be rejected. Port ngeles Telecable's own peti- ion concedes that a substan- ial portion of KVOS-TV's evenue is derived from net- ork sources, which conced- dly are rated on the basis of irculation in the United tates.* (R. 0012).

FCC's Memorandum Opinion and Order (R. 0015-0018) (Emphasis added)

duplicating their own. It would be disruptive of KVOS-TV's audience in Port Angeles for its network programming to continue to permit that programming to be duplicated from Seattle. Our *Second Report* explains the reasons for requiring program exclusivity and Telecable has not shown that these reasons are not fully applicable here.

Finally, the claim that KVOS would not be prejudiced is, again, not adequately supported. While it is suggested that it derives substantial revenues from its Canadian circulation, it is conceded that it has a network base hourly rate of $300, which depends upon its audience for the network programs here in question. Port Angeles is within its Grade A contour, and it is the only American station which provides dependable over-the-air service to that community. (R. 0016).

3. The Commission's Rules pertaining to waiver appl tions provide that "The petition may be submitted formally, by letter . . . ." (§ 74.1109(b)), [see Appe A attached to this Brief] and that the Commission, a the consideration of the pleadings, may determine whe the public interest would be served by the grant, in wl or in part, or denial of the request, or may issue a ru on the complaint or dispute. The Commission may spe other procedures, such as oral argument, evidentiary h ing, or further written submissions directed to partic aspects, as it deems appropriate (§ 74.1109(f)). [Appendix A attached to this Brief.]

If the Commission did not believe that Mr. Chapm affidavit was conclusive, it could have held oral argum ordered a hearing or at least it could have ordered furt written submissions in the case. (R. 29). Instead, it tur down the request for waiver summarily and arbitra (R. 30 and R. 0015-R. 0017).

In fact, the Commission's Memorandum Opinion Order in this case indicates that the Commission already made up its mind and that no matter how suasive Petitioner's proof was, the outcome would h been the same. The Commission said: "But even if t these arguments are not persuasive."[16] This conclu defies logic. If Petitioner's statements supported affidavit are true and correct to the effect that Port Ang has a greater community of interest with Seattle than Bellingham (R. 0003, 0004), that KVOS-TV obtains revenue primarily from its Canadian audience (R. 0 0005) and that *KVOS-TV would not be prejudiced* b grant of the waiver (R. 0005), then there would be no pu interest involved in protecting KVOS-TV from competi with the Seattle television stations and depriving CA subscribers from the programs and advertising of

[16] Memorandum Opinion and Order released January 23, 1968, pa (R. 0015).

Seattle television stations. The Commission confesses its arbitrariness and capriciousness in this statement. (R. 30).

The Commission's non-duplication rules are on their face a protectionist policy for television stations regardless of need. The proof is that they go into effect in any particular case and in all cases only if the television station requests the protection in writing from the CATV system. These Rules were adopted in spite of the policy of the Communications Act which allows television stations to be involved in the competitive free enterprise system without being subjected to public utility, common carrier and profit limiting rules such as pertain to telephone common carriers, for instance. The non-duplication rules apply regardless of a showing of need by the television station. Thus the public is deprived of information and advertising messages because of these arbitrary and capricious rules of the Commission, contrary to the First Amendment to the Constitution of the United States. (R. 30 and 31).

The Commission stated:

> "It makes no real difference to the cable subscribers whether they watch CBS programming on the channel alloted to KIRO." [17]

The Commission has evidence in its files that CATV subscribers often react violently to having a television channel to which they are accustomed yanked away from them by Commission action. For example, one CATV system, in a case brought to the Commission's attention, lost 300 subscribers within the very first month by complying with the Commission's Rules.[18] When the Seattle stations are blacked out by the Commission's action, the particular channels remain dark instead of containing a station's

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[17] Memorandum Opinion and Order released January 23, 1968, pp. 1 and 2 (R. 0015 and 0016).

[18] The Black Hills Video Corporation and Midwest Video case referred to in n. 10, *supra*.

program. This is a deprivation of a service for which he CATV subscriber pays a monthly fee. Part of the consideration for the monthly fee is to light up as many channels or television signals as can be received in the locality by means of the coaxial cable. Insistence by the Commission upon imposing these arbitrary and capricious Rules probably will cause Petitioner to lose many subscribers and thus be deprived of its property without due process of law in violation of the Fifth Amendment to the Constitution of the United States. Furthermore, the Commission's Rules, if upheld, would require Petitioner to spend several thousands of dollars in obtaining additional personnel in order to switch the programs off and back out the channels or to purchase an expensive time-clock which is designed to do this automatically, or to do both of these things. Furthermore, time-clocks are not reliable and they can involve Petitioner unwillingly and unwittingly in violation of the Rules and subject it to punishment by the FCC. (R. 31 and 32).

The Commission knows that its following statement is inaccurate:

> "It makes no real difference to the cable subscribers whether they watch CBS programming on the channel allocated to KVOS rather than on the one allotted to KIRO, and the former's signal should be the stronger one in the Port Angeles area." [19]

Were non-duplication pursuant to the Commission's Rules put into effect, the channels on which the duplicating Seattle stations occur would be blacked out while KVOS broadcast the same programs and the same programs cannot be broadcast for a twenty-four hour period. The CATV subscriber while watching a program is suddenly faced with an exasperating blacked out screen and

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[19] Memorandum Opinion and Order released January 23, 1968, pages 1 and 2 (R. 0015 & 0016).

he must get up and change it to another channel. (R. 32). In the case of shut-ins or sick or crippled people, this can cause a very serious disruption. Furthermore, the programs may be lost to the particular viewers, if a movie, for instance, is shown at a particular time on a particular day by KVOS-TV and because of the FCC Rules it cannot be received that day on a Seattle television station at another time on the same day, when the particular viewers have the time or the opportunity to see it. All of this was explained at length to the FCC by NCTA in the proceedings which led to the issuance of the *Second Report and Order.* This is a glaring instance where a Government agency purports to know more than the particular business operator whether it makes a real difference to the clientele to be deprived of a program at a particular time. (R. 33).

5. The Commission made the assumption that KVOS's signal "should be the stronger one in the Port Angeles area."[20] That is a pure assumption, not based upon any fact in the record. The Commission should know that a CATV system usually obtains its signal on a tower on a high mountain-top where the mountains would not interfere with reception as they do in the valleys. Port Angeles' pleading stated that Bellingham is a greater distance from Port Angeles than Seattle. (R. 33).

6. The Commission's finding that "it would be disruptive of KVOS-TV's audience in Port Angeles for its network programming to continue to permit that programming to be duplicated from Seattle[21] is not based upon any substantial evidence in this record or in the proceedings which led to the *Second Report and Order,* as NCTA for Petitioner and others pointed out in the latter proceedings. KVOS has not shown that its programming is or will be disrupted

[20] Memorandum Opinion and Order released January 23, 1968, page 2 (R. 0016).

[21] Memorandum Opinion and Order released January 23, 1968, page 2 (R. 0016).

by Petitioner's CATV continuing to do what it has done for years, viz., to receive the programs from the Seattle stations. (R. 33 & 34).

KVOS-TV in its Opposition To Petition For Waiver (R. 0009-R. 0014) filed by Port Angeles did not deny that it had a choice television allocation because of its proximity to the Canadian markets which it serves. The Commission's annually published statistics for the last five years indicate that the average commercial television station in the United States makes unprecedented profits, by comparison with other businesses. Those statistics prove that the average commercial broadcast station currently makes between 100% and 105% return on its capital investment each year before taxes and depreciation. Under the circumstances, it is unreasonable, arbitrary and capricious for the Commission to issue a rule which requires protection by a CATV system of a television station without proof of the need of such protection on the part of the broadcast station requesting protection, through an enforced black out of the programs of competing television stations in other markets. The *Second Report and Order* of the Commission states that the television station is entitled to such protection without proof or even allegation of need. The public is made the loser in this type of arbitrary and capricious Rule and the private businessman who operates a CATV system. (R. 34).

H. Summary of Argument

The regulations adopted by the Commission in its *Second Report and Order* deal in considerable detail with a wide variety of subjects such as whether a CATV system has the right to carry only the signals of its choice or whether it must carry the signals of local television stations.

This issue is not present here because Petitioner voluntarily carries the signals of so-called local television stations, including that of KVOS-TV, the Intervenor herein.

The simple aspect of the Commission's Rules involved in this case is whether the Commission has the right to compel arbitrarily a CATV operator to black out to his financial detriment from his subscribers' view the signals of television stations which they can see anyway on their television sets by means of a roof-top antenna.

Because this question is inextricably interwined with the question of Commission jurisdiction to regulate those CATV operators, such as Petitioner, who make no use of the radio spectrum, this latter question will be argued first.

There is nothing in the Federal Communications Act of 1934 which gives to the Commission authority to regulate a business which makes no use of the radio spectrum, except a common carrier by wire engaged in interstate commerce. A CATV system makes no use of the radio spectrum, and the Commission itself and the Courts have ruled that a CATV system is not a common carrier. Therefore, a CATV system, such as Petitioner, which is not served by microwave, is not subject to the Commission's jurisdiction. The Commission repeatedly has asked the Congress for this power and the Congress did not grant its request.

Even if it were conceded, *arguendo,* that the Commission did have jurisdiction over Petitioner, the Commission does not have the authority to deprive the viewing public of its right to select the television programs of its choice through general rules adopted upon the mere conjecture and without proof that a CATV system will have an adverse economic impact upon television stations to the extent that the public interest will be adversely affected.

Again, if it were conceded, *arguendo,* that the Commission could regulate CATV systems, the Commission cannot apply its regulations to a CATV system which was in existence before the Commission asserted its jurisdiction in a way which causes the CATV system to lose subscribers or

which threatens its continued existence. This is a deprivation of property without due process of law.

Even if the Commission did have jurisdiction over CATV systems, it cannot arbitrarily discriminate between CATV subscribers and the general public by prohibiting the CATV subscribers only from viewing certain television programs available to all in the CATV community.

The Commission cannot without violating its own precedents and the antitrust laws of the United States prohibit advertising from distant television stations from being received in the community by CATV subscribers only.

The Commission cannot impose upon a non-licensee, such as Petitioner, the restrictions imposed upon its licensees while simultaneously denying to the CATV operator the procedural protections afforded to licensees under the Communications Act of 1934 because he is a non-licensee.

ARGUMENT

I. THE COMMUNICATIONS ACT OF 1934 CONFERS NO AUTHORITY ON THE COMMISSION TO REGULATE NON-MICROWAVE CATV SYSTEMS

The Commission rested its Memorandum Opinion and Order in this case squarely upon its *Second Report and Order* in Docket Nos. 14895, et al., 2 FCC 2d 725 (R. 0016). The Commission stated: "Our *Second Report* explains the reasons for requiring program exclusivity and Telecable has not shown that these reasons are not fully applicable here." (R. 0016). The Commission does not base its decision upon any other grounds.

The *Second Report and Order* (2 FCC 2d 725 [1966]) was based upon the following alleged authority contained in the conclusion of that Report and Order:

> *Conclusion*
>
> 154. Authority for adoption of these rules is contained in Sections 1, 4(i), 303, 307(b), 308, and 309 of the

> Communications Act. We wish to stress particularly the provisions of Section 1 that the general purpose of the Act is to "maintain the control of the United States over all the channels of interstate and foreign radio transmission . . . under licenses granted by federal authority"; of Section 303(h), "to establish areas or zones to be served by any station"; of Section 307(b), to make "a fair, efficient, and equitable distribution of radio service among the several states and communities", Section 303(g), to study new uses of radio and generally encourage the larger and more effective use of radio in the public interest, and Section 303(s), the "all-channel receiver" section. The rules we adopt here, under the rule making power bestowed upon the Commission in Sections 4(i) and 303(r), are designed to "study new uses" and insure future CATV activity and growth consistent with the "larger and more effective use of radio in the public interest". Indeed, the type of situation here involved is the very reason for the creation of this agency as the history of early chaos in the radio field shows. As the Supreme Court has stated, the Communications Act "expresses a desire on the part of Congress to maintain, through appropriate administrative control a grip on the dynamic aspects of radio transmission" (*FCC* v. *Pottsville* Bctg. Co., 309 U.S. 134, 138; see also *NBC* v. *U. S.*, 319 U.S. 190).

The Commission is composed of seven members and three of the members dissented to all or certain parts of the *Second Report and Order.*

Commissioner Bartley's dissent is as follows:

> I dissent from the action asserting jurisdiction over community antenna systems. In my opinion, the Communications Act does not now confer such jurisdiction and the Commission is without authority to promulgate these rules.
>
> I believe that we should seek legislation to resolve the basic considerations in this matter. Since the real concern surrounding CATV appears to be its possible evolution into pay TV, I propose an amendment of the Communications Act to preclude community

> antenna systems from distributing programs other than those received from transmissions of broadcast stations.
>
> I am opposed to the rule's impediments on entry of community antenna systems into the top 100 markets, and specification of the Grade B contour, rather than the Grade A or lesser contour, as the benchmark for requiring carriage of local TV stations. (Attached to *Second Report and Order*).

Commissioner Loevinger concurred in the substantive provisions of the Order but said:

> "I cannot join in the opinion or agree that the Commission has the jurisdiction which it now asserts." . . .
>
> On the other hand, the assertion of jurisdiction is a legal matter that requires a legal judgment. Nothing has appeared or occurred since the previous Commission statement on this subject that furnishes any basis for reaching a different conclusion as to jurisdiction than the one set forth in my prior opinion. 38 FCC 683, 746 (1965). Accordingly, I adhere to that opinion and to the conclusions stated there." (Attached to *Second Report and Order*).

Commissioner Loevinger is a former judge of the Supreme Court of Minnesota. Because of the lucidity of his views in the devastating attack which he made upon the alleged jurisdiction of the Commission, his dissenting opinion attached to the First Report and Order of the Commission (30 F.R. 6038; 38 FCC 683, 746 (1965), and incorporated by reference in his dissent to the *Second Report and Order* (31 F.R. 4540; 2 FCC 2d 725 [1966]) is carried in full in Appendix B to this brief.

Petitioner is a member of the National Cable Television Association, Inc., (hereinafter NCTA) of Washington, D. C., which is the only national trade association for CATV systems in the United States. All of the legal arguments contained in this brief were made in substance

by NCTA on behalf of its members in the proceedings before the Commission which led to the issuance of the *First Report and Order* and the *Second Report and Order* in Docket Nos. 14895, 15233 and 15971. These legal challenges are now pending in cases in the Circuit Court of Appeals for the Eighth Circuit[22] and some of the issues are being reviewed in the Supreme Court of the United States on certiorari from a decision of this Court.[23] (R. 24, 25, 33). The case was argued before the Supreme Court of the United States on March 12 of this year and a decision is expected before the end of the Supreme Court's present term in June of this year.

The alleged basis of the Commission's jurisdiction to regulate non-microwave CATV systems is contained in the Conclusion of the *Second Report and Order, supra.* Succinctly stated, as it is generally in the Government's briefs before the Courts and such as in the *Southwestern Cable Company* case now pending before the Supreme Court of the United States, it amounts to the following:

> "CATV constitutes interstate communication by wire (47 U.S.C. 152(a), 153(c) since the systems physically intercept and extend television signals. By so doing, they directly affect and threaten to disrupt the allocation plan for off-the-air television service established by the Commission under the Act (47 U.S.C. 303(h) and (s), 307(b). CATV is therefore subject to the Commission's general regulatory powers (47 U.S.C. 154(i), 303(f) and (r), 312(b))."

This argument is wholly dependent upon the assumption that CATV constitutes "interstate communication by wire"

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22 *Black Hills Video Corporation and Midwest Video Corporation, Petitioners* v. *United States of America and Federal Communications Commission* (Case No. 18,052).

23 *Southwestern Cable Co., et al.* v. *United States of America and Federal Communications Commission* (378 F. 2d 118—C.A. 9, 1967); *United States of America and Federal Communications Commission* v. *Southwestern Cable Co., et al.* (Case No. 363. October Term, 1967) on certiorari to the Supreme Court of the United States.

and therefore falls under the authority vested in the Commission. The argument refers to the fact that Sections 303(h) and 307(b) of the Act, 47 U.S.C. §§ 303(h), 307(b) (1964), empower the Commission "to establish areas or zones to be served by" radio stations and to provide for a "fair, efficient, and equitable" distribution of radio services "among the several States and communities." It notes that Section 303(s)[24] was enacted to effectuate the policy of encouraging local broadcasting by authorizing the Commission to require television receivers shipped in interstate commerce be equipped to receive UHF transmission. Finally, it refers to Sections 4(i), 303(f) and 303(r), 47 U.S.C. §§ 154(i), 303(f), 303(r) (1964), general provisions conferring authority upon the Commission to perform acts, make rules and regulations, prescribe restrictions and conditions and issue orders.

The Commission's assertion of jurisdiction over CATV, based on claimed authority over "interstate communication by wire" explicitly disavows reliance on the Commission's authority to regulate common carriers under Title II of the Act. On the contrary, the Commission has expressly rejected the view that CATV systems are common carriers. *Frontier Broadcasting Co.* v. *Collier,* 24 F.C.C. 251 (1958); *Philadelphia Television Broadcasting Co.* v. *FCC,* 359 F.2d 282 (D.C. Cir. 1966). It also ruled that CATV is not engaged in broadcasting and that, therefore, its activities do not constitute unauthorized rebroadcasts in violation of Section 325(a) of the Act, 47 U.S.C. § 325(a) (1964). (*Frontier Broadcasting* case, *supra*).

Nor does the Government contend that CATV constitutes "radio communication." The suggestion was considered and rejected by the Commission when it originally decided it had no authority to regulate CATV. *CATV and TV*

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[24] 47 U.S.C. § 303(s) (1964). This is the so-called All-Channel Receiver Law. Pub. L. No. 87-29, 76 Stat. 150 (1962).

Repeater Services, 26 F.C.C. 403, 428-29 (1959). It was again discussed in the Commission's Memorandum On Its Jurisdiction and Authority, 1 F.C.C.2d 453, 478-82, issued on April 23, 1965, as an attachment to the *Notice of Inquiry and Notice of Proposed Rule Making* which initiated the *Second Report and Order.* However, when the Commission issued the *Second Report and Order* on March 4, 1966, almost one year later, it relied for its claim to jurisdiction solely on its view that CATV constitutes communication by wire. In these circumstances the contention that CATV also constitutes communication by radio cannot be considered here. *SEC* v. *Chenery Corp.,* 318 U.S. 80, 87 (1943).[25]

. History and Structure of the Communications Act in 1934

Prior to 1934 the authority over radio communications now exercised by the Federal Communications Commission under Title III was exercised by the Federal Radio Commission pursuant to the Radio Act of 1927, 44 Stat. 1162. At that time the Interstate Commerce Commission regulated communications common carriers pursuant to the Interstate Commerce Act.[26] 41 Stat. 475. Section 1 of the Communications Act, 47 U.S.C. § 151 (1964), makes it clear that the purpose of the Communications Act was to

[25] The Radio Act of 1927, from which Title III of the Communications Act derived, was directed at the elimination of confusion, chaos and conflicting use of the radio spectrum. National Broadcasting Co. v. United States, 319 U.S. 190, 211-13 (1943). But CATV does not involve use of the spectrum, and the Act contains no standards for the regulation of this type of communication. However, if CATV were determined to constitute interstate communication by radio, difficult problems would arise concerning the Commission's present system of leaving a large measure of regulation to State and local authorities. The regulatory scheme for interstate communication by radio preempts the field and is "exclusive of State action." Allen B. Dumont Laboratories, Inc. v. Carroll, 184 F. 2d 153, 155 (3d Cir. 1950), *cert. denied,* 340 U.S. 929 (1951).

[26] In addition, the Postmaster General had certain jurisdiction over common carriers. S. Rep. No. 781, 73d Cong., 2d Sess. 1 (1934); H.R. Rep. No. 1850, 73d Cong., 2d Sess. 3 (1934).

vest in one central body the authority formerly exercise by separate agencies with different statutory grants i one statute administered by one agency,[27] and additionall to confer certain specified new authority upon the agenc so established.[28]

Before the enactment of the Communications Act, on common carriers had been regulated under the Intersta Commerce Act. The relevant provisions of that Act we repealed by Section 602(b) of the Communications Act, U.S.C. § 602(b) (1964), and were reenacted as Title II the latter act. Only radio communication had been re nlated pnrsuant to the Radio Act of 1927, which was r pealed by Section 602(a) of the Communications Act, U.S.C. § 602(a) (1964), and was essentially reenacted Title III.

The structure of the Communications Act is compar tively clear. Title I 47 U.S.C. §§ 151-155 (1964), is entitl "General Provisions". It sets forth the purposes of t Act, establishes the Commission, defines the terms used a contains familiar organizational provisions. Section 1, Ti I, is captioned "Purposes of Act, Creation of Federal Co munications Commission". It states that "[f]or the pu pose of regulating interstate and foreign communicati by wire and radio", and for related purposes, "there hereby created a commission to be known as 'Feder Commmnications Commission'." Section 2(a), Title I, captioned "Application of Act" and states that "[*t*]

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27 *Ibid.*

28 For example, Section 307(b), 47 U.S.C. § 307(b) (1964), as origin enacted was a new provision authorizing the issuance of additional lice for stations not exceeding 100 watts in power. Similarly, Sections 325 anw 325(c), 47 U.S.C. §§ 325(b), (c) (1964), were new provisions desig to give the Federal Communications Commission control over broadcast stu in the United States used to furnish programs to be broadcast to the Un States from a foreign country. See S. Rep. No. 781, *supra*, at 6, 8; H.R. R No. 1918, 73d Cong., 2d Sess. 48, 49 (1934).

provisions of this Act shall apply to all interstate and foreign communication by wire." (Emphasis added). Title II, 47 U.S.C. §§ 201-22 (1964), is entitled "Common Carriers" and deals only with common carriers "engaged in interstate or foreign communication by wire or radio," 47 U.S.C. § 201. Title III, 47 U.S.C. §§ 301-97 (1964), is entitled "Special Provisions Relating to Radio". Its purpose is set forth as, "among other things, to maintain the control of the United States over all the channels of interstate and foreign radio transmission," 47 U.S.C. § 301. Title III confers broad powers upon the Commission to regulate radio transmission, including the power to issue radio station licenses, 47 U.S.C. §§ 303(e), 307(a); and licensing pursuant to the standard of "public convenience, interest, or necessity" is the basic instrument for the exercise of those powers. *Regents* v. *Carroll,* 338 U.S. 586, 597-98 (1950).[29]

Non-common carrier wire communication, whether or not interstate, does not fall within either of the two basic subject matters of regulation dealt with in the Act. It is not under Title II unless it is wire communication engaged in by a common carrier. Even if it should be conceded that CATVs engage in interstate wire communication, the Commission's consistent holdings that they are, nevertheless, not common carriers operates to exclude them from regulation under Title II. Similarly, CATVs are not subject to regulation under Title III because they are not engaged in radio communication.

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[29] The remaining titles of the Act which are not pertinent to the questions presented, are captioned "Procedural and Administrative Provisions" (Title IV; 47 U.S.C. §§ 400-10), "Penal Provisions" (Title V; 47 U.S.C. §§ 501-10) and "Miscellaneous Provisions" (Title VI; 47 U.S.C. 6010xxx; VI; 47 U.S.C. §§ 601-07).

B. Commission Regulation of Interstate Wire Communicatio by Non-Common Carriers

Once it is recognized that—whatever else CATV may b —it is neither a common carrier, nor engaged in radi transmission, it inevitably follows that CATV falls outsid the regulatory areas defined in Titles II and III of th Communications Act whether or not it has interstat impact.[30]

The Commission usually points out, however, that th term "communication by wire" in Sections 1 and 2(a) o the Act, is not limited to common carriers. And it is th use of the term in these sections which is relied upon by th Commission for the assertion of Commission authority ove CATV; and that such references in the Act constitute separate and independent grant of authority to regulat CATV activities.

Stated otherwise, the linchpin of the Commission's con tention is that Section 2(a) of the Act confers authorit over CATV as an activity in "interstate wire communica tion"; and, since the Commission has determined tha CATVs are not common carriers, that it has authority t regulate such non-common carriers engaged in wire com

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[30] The contention that CATV systems, such as the petitioner's, whose o erations are confined within a single state are nevertheless engaged in "inte state" communication by wire is subject to considerable question. Sectio 2(b) of the Act, 47 U.S.C. § 152(b) (1964), expressly precludes Commissio jurisdiction even over carriers "engaged in interstate or foreign communica tion solely through facilities connected with the facilities of another carrier" not under common control or "solely through connection by radio, or by wir and radio, with facilities located in an adjoining State or in Canada o Mexico . . . of another carrier" not under common control. In his separat opinion, concurring in part and dissenting in part to the First Report an Order, Commissioner Loevinger concluded from Section 2(b) and simila limitations contained in Sections 214, 221(b) and 301(d) of the Act, 4 U.S.C. §§ 214, 221(b), 301(d) (1964), that the intent of Congress wa ". . . to deny the Commission jurisdiction over intrastate carriers which ar not part of a single integrated system and which simply carry signal emanating from another State." First Report and Order, 38 F.C.C. 683 753-54 (1965). (See Appendix B hereto).

unication. If it does not have the claimed authority to gulate such non-common carriers the entire argument lls.

It is submitted that this essential basis of the Commis-on's claim to authority over CATV systems cannot be pported—that, on the contrary, under Section 2(a) of the t the Commission does not have authority to regulate ATVs engaged in wire communication and that this is so ether or not the wire communication is interstate. This manifest from the explicit terms of Section 2(a), which mit the Commission's authority to the "provisions of is Act"; the absence of any such "provisions", substan-ve or procedural, or authority relating to interstate wire mmunication by non-common carriers in general and ATV in particular; the legislative intent; and the history the Act's administration.

Section 2(a) states only that the "provisions of this Act all apply . . . to all interstate and foreign communication wire," but does not describe which *provisions* apply, in hich circumstances, under what terms, or to what extent. ch a delineation of authority—essential to valid delega-n to an administrative agency—is set out in the other ovisions of the Act. It is indisputable, based on a search-ng and meticulous examination, that the Act is devoid of y single provision granting regulatory authority over n-common carriers engaged in wire communications.[31] he absence of any such regulatory provisions relating to

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[31] For this reason cases such as National Broadcasting Co. v. United States, 3 U.S. 190 (1943), and American Trucking Assn's v. United States, 344 U.S. 2 (1953), and by the District of Columbia Circuit in Buckeye Cablevision I. v. FCC, No. 20274 (D.C. Cir., June 30, 1967), are irrelevant. Those cases d lt only with the scope of regulatory authority over persons or entities (e.g., ntor carriers and radio station licensees) already recognized to be subject t some regulatory authority. They are not precedents with respect to the ension of administrative authority to entities or persons not covered by t relevant statute at all.

non-common carriers engaged in wire communication when contrasted with the comprehensive regulatory regim governing radio and common carriers spelled out in d tailed provisions implementing Section 2(a), clearly r veals the purpose of the Act to regulate common carrier but not to regulate non-common carriers engaged in wi communication.[32]

In fact the Act confers upon the Commission only thr functions with respect to wire communications generall i.e., functions not limited to common carriers. Section 4(o 47 U.S.C. § 154(o) (1964), directs the Commission to "i vestigate and study" problems relating to the maximu effective "use of radio and wire communication . . . [they relate to the] safety of life and property." And Se tion 4(k), 47 U.S.C. § 154(k) (1964), directs it to mal

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[32] The terms "wire communication" or "communication by wire" appe in a number of sections of the Act other than Sections 1 and 2(a). Th one or the other term is used in a number of the provisions of Title II, ho ever only in connection with common carriers. Moreover, the terms may a be found in Sections 2(b), 3(a), 3(e), 4(b), 4(k), 4(o), 406, 410(a), 4 502, 503(a), 602(b), 602(d), 604(e), 605 and 606 of the Act, 47 U.S §§ 152(b), 153(a), 153(e), 154(b), 154(k), 154(o), 406, 410(a), 412, 5 503(a), 602(b), 602(d), 604(e), 605, 606 (1964). A number of these pro sions are also expressly confined in their impact to common carriers, e. Sections 406, 503(a) and 604(e). Others do have a direct or indirect i pact upon non-common carrier wire communication. Section 605 prohibits w tapping and is not limited to common carrier communication. Section 6 confers certain emergency powers upon the President—not upon the Co mission—with respect to all forms of wire communication, but "during t continuance of a war" only. The limitation on financial interests of Fede Communication Commissioners, contained in Section 4(b), is not limited interests in common carriers. Section 4(k) requires the Commission to ma annual reports to Congress containing information that the Commission m consider "of value in the determination of questions connected with t regulation of interstate and foreign wire and radio communication and ra transmission of energy." Similarly, Section 4(o) directs the Commission investigate and study matters relating to "the use of radio and wire co munications in connection with safety of life and property." Section 3(is merely a definition and serves only the normal purpose of a statutory defi tion. Thus these references to "wire communication" or "communicati by wire" contained in the Act clearly establish no general system for t regulation of non-common carrier wire communication.

nnual reports to Congress and provides that the reports hall contain "specific recommendations as to additional egislation" and are to contain information collected by he Commission "of value in the determination of questions onnected with the regulation of interstate and foreign wire nd radio communication." The limitation of an agency's unction with respect to a specific subject matter to study, nvestigation and recommendation to Congress is familiar. *PC* v. *Panhandle Eastern Pipe Line Co.*, 337 U.S. 498, 05 (1949). In addition, Section 605, 47 U.S.C. § 605 1964), prohibits wire tapping with respect to "any inter- ate or foreign communication by wire or radio," and the ommission has comprehensive regulatory powers to effec- uate that prohibition. *Benanti* v. *United States*, 355 U.S. 3 (1957). These three functions do not, of course, estab- sh a general system for the regulation of non-common arrier wire communication.

The legislative history of the Act expresses the clear and nequivocal intent not to confer on the Commission regu- tory authority over non-common carrier wire communi- tion. The statement of the managers on the part of the ouse, included in the Conference Report, noted that the enate version of Section 3(h), 47 U.S.C. § 153(h) (1964),[33] ld been adopted and stated:

> It is to be noted that the definition does not include any person if not a common carrier in the ordinary sense of the term, *and therefore does not include press associations* or other organizations engaged in the business of collecting and distributing news services which may refuse to furnish to any person service which they are capable of furnishing, and may furnish service

[33] Section 3(h) of the Act provides that " 'common carrier' or 'carrier' eans any person engaged for hire, in interstate or foreign communication wire or radio or in interstate or foreign radio transmission of energy, except here reference is made to common carriers not subject to this Act; but a erson engaged in radio broadcasting shall not, insofar as such person is so gaged, be deemed a common carrier."

> under varying arrangements, establishing the servi
> to be rendered, the terms under which rendered, ar
> the charges therefor.

H.R. Rep. No. 1918, 73d Cong., 2d Sess. 45-46 (193
(emphasis added).[34] To treat Sections 1 and 2(a) as ind
pendent sources of regulatory authority would require
conclusion that the draftsman smuggled authority in
those sections which they deliberately excluded from Tit
II.[35]

Nor may it be argued that the Commission's asserte
power over CATV differs from its clear lack of authori
over the press and other non-common carriers engaged
communication by wire for the reason that such groups a
not involved in and do not have an impact on broadcastir
The fact is that radio and television networks are similar
engaged in communication by wire, and their involveme
with and impact upon broadcasting in general and televisi
in particular is profound. And it is also the fact that t
Commission has not asserted jurisdiction over networ
On the contrary, the Commission has repeatedly and e
plicitly disavowed authority over the networks. Thus,
Don Lee Broadcasting System, 5 P&F Radio Reg. 11
1197-98 (1949), the Commission stated:

> The network regulations are designed to insure th
> control of the individual stations is not forfeited to
> network organization with which such stations a
> affiliated. The networks, as such, are not licensed
> the Commission and are under no statutory obligati
> to serve the public interest. The Chain Broadcasti
> Regulations, therefore, are designed to govern the co
> duct of the individual stations rather than the networ
> . . . .

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[34] See also H.R. Rep. No. 1850, *supra* note 26, to the same effect.

[35] In this connection it it noteworthy that CATV systems carry and origin
news programs.

The analogy between CATV operations over which the Commission has presumed to assert authority, and network operations where the Commission has disavowed authority is striking, and on "all-fours". Networks are engaged in transcontinental communication by wire for the purpose of "carriage" of television broadcast programs.[36] The availability of net work programs and indeed the availability of net work affiliation agreements is frequently crucial to the difference between success and failure of television broadcast operations and particularly UHF station operations.[37] Regulation of networks by the Commission could be a highly effective means of attaining Commission objectives not otherwise attainable, including its allocation plan for off-the-air service and service to local communities. One direct means of encouraging UHF broadcasting would be a requirement that networks accept as affiliates a certain percentage of UHF broadcasters.

The Commission, however, has never asserted that its general regulatory powers may be exercised upon the networks in order to foster its plan for allocation of television service.[38] Instead, it has expressly advised Congress that "The Commission has no jurisdiction over networks as such and the Commission does not have authority to license

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[36] It is irrelevant to the question presented that networks lease lines from telephone common carriers. But in any event many CATV systems also lease lines from the same companies and for the same purpose. And the Commission in asserting jurisdiction over CATVs does not distinguish between systems which own and those which lease their lines.

[37] "The inability of most UHF stations to obtain network affiliation, or, if affiliated, to obtain sufficient network commercial programs was an important factor in the limited development of the UHF service." Network Broadcasting, Report of the Committee on Interstate and Foreign Commerce, H.R. Rep. No. 1297, 85th Cong., 2d Sess. 226 (1958).

[38] Thus, the chain broadcasting regulations involved in National Broadcasting Co. v. United States, *supra*, note 31, were "addressed in terms to station licensees and applicants for station licenses" and not to networks, 319 U.S. at 198.

or regulate networks''[39] and that the Commission ''canno reach networks directly''.[40] When it has deemed it desir able to exercise direct regulatory authority over networks it has sought such authority from Congress.[41] Based o fact, logic and law the assertion by the Commission of juris diction over networks is a flat and absolute contradictio And the assertion of jurisdiction over CATVs cannot b defended in the light of the Commission's opposite answe over the course of more than three decades to the identica question presented with respect to networks. On the co trary, since the Commission has not presumed to clai jurisdiction over the networks which are the lifeblood o broadcast operations, how can it validly assert such a thority over CATV?

The compelling conclusion that the Commission does n have authority over wire communication by non-commo carriers also is supported by the consistent and unifor practice of the Commission in other areas over an extende period of time. For years non-common carrier wire co munication systems have been in extensive use and have n been subjected to regulation by the Commission. In add tion to the press services, hundreds of mil

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[39] H.R. Rep. No. 1297, 85th Cong., 2d Sess. 628 (1957).

[40] Hearings before a Subcommittee of the House Committee on Interst and Foreign Commerce, *Responsibilities of Broadcasting Licensees and Stat Personnel*, 86th Cong., 2d Sess. 672 (1960).

[41] With the support of the Commission, two bills were introduced in t 86th Congress. One was H.R. 5042 (entitled in part ''A Bill To Amend t Communications Act of 1934 To Subject Television Networks to Cert Controls''), and the other was H.R. 11340 (entitled in part ''A Bill To Am the Communications Act of 1934 . . . To Provide for the Regulation National Networks''). H.R. 5042 provided authority for the Commission make rules and regulations directly applicable to the television networks, w H.R. 11340 provided for the exercise of regulatory authority over the netwo under a mandatory system of licensing national networks. Each was desig to give the Commission specific regulatory authority over the networks. H.R. Rep. No. 281, 88th Cong., 1st Sess. 149-50 (1963). Neither bill w enacted, and similar legislation, introduced in the 87th Cong., 1st Sess. S. 2400, also failed of enactment.

of private non-carrier communication systems have been operated (some as early as 1851) by railroads, electric power, petroleum and natural gas pipeline companies with rights of way or similar facilities which make it practical for them to do so. See *AT&T (Railroad Interconnection)*, 32 F.C.C. 337 (1962). The railroad industry alone maintained over 200,000 miles of pole line in 1957.[42] Yet the Commission has never—before it asserted authoriy over CATV—undertaken to regulate the operation of such systems.[43] Thus, while the annual reports of the Commission make reference to Sections 1 or 2(a), the functions they describe include only the regulation of common carriers and radio communication; they do not refer to non-common carrier wire communication.[44]

C. The Communications Act Provides None of the Required Substantive and Procedural Standards for Regulation of Wire Communication by Non-Common Carriers.

The structure of the Communications Act is such that the assumption that the Commission has authority to regulate non-common carrier forms of wire communication leaves it wholly without statutory standards for the exercise of the authority. In sharp contrast, the Act does contain both general and detailed standards for the regulation of radio communication and common carriers. The licensing power which the Commission exercises with respect to radio under Title III must be administered in the

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42 See In the Matter of Allocation of Frequencies in the Bands Above 890 mc, 27 F.C.C. 359 (1959).

43 The only area affecting such private wire communication systems which the Commission undertakes to regulate relates to whether the practices of common carriers, subject to Commission authority, permitting or denying the private wire communication systems to interconnect with the carriers are discriminatory. AT&T (Railroad Interconnection), 32 F.C.C. 337 (1962). This, of course, represents a regulation of the carriers, not of the non-carrier wire communication system seeking interconnection.

44 See, *e.g.*, 18 F.C.C. Ann. Rep. 13, 15 (1952); 28 F.C.C. Ann. Rep. 15 (1962); 31 F.C.C. Ann. Rep. 10 (1965).

"public interest, convenience, or necessity", a standard found adequate in *Federal Radio Commission* v. *Nelson Bros. Bond and Mortgage Co.*, 389 U.S. 266, 285 (1933), and *National Broadcasting Co.* v. *United States*, 319 U.S. 190, 226-27 (1943), in the light of its context, the purposes of the Act and the requirements it imposes. Similarly, the standards used for the regulation of common carriers pursuant to Title II are familiar and adequate for public utility regulation.[45] These general standards are given flesh in numerous provisions of the Act dealing with substantive, procedural and remedial matters relating to the regulation of common carriers and radio communication. Those provisions incorporate the basic legislative standards governing the regulatory authority conferred on the Commission. They specify with care, precision and detail the substantive and procedural criteria for regulation under Title II[46] and under Title III.[47]

Moreover, the Act expresses an explicit concern with areas of radio and common carrier activities excluded from

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[45] *E.g.*, Section 201 requires charges, practices, etc., to be "just and reasonable" and Section 214 requires certificates of "public convenience and necessity" for common carrier operations.

[46] *E.g.*, unjust and unreasonable discriminations, 47 U.S.C. § 202(a); the use of franks and passes, 47 U.S.C. § 210(a); adequacy of facilities, extension of lines and public offices, 47 U.S.C. § 214(d); required records and depreciation practices, 47 U.S.C. § 220(a)(b); length of suspension of new charges, and hearing requirements, 47 U.S.C. § 204; court injunction involving reductions or extensions of service, 47 U.S.C. § 214(e); cease and desist authority, 47 U.S.C. § 205(a); claims for damages in proceedings instituted either in the courts or before the Commission, 47 U.S.C. §§ 206, 207, 208 and 209.

[47] *E.g.*, classification of radio stations, including areas and zones served and power and time of operation, 47 U.S.C. § 303; restrictions on grants to aliens, 47 U.S.C. § 310; operation of transmitting apparatus by licensed operators, 47 U.S.C. § 318; standards for distribution of licenses, frequencies, hours of operation and power among the several states and communities, 47 U.S.C. § 307(b); terms of licenses and standards, as well as procedural requirements governing renewals, 47 U.S.C. §307(d); and substantive and procedural conditions governing modification, suspension and revocation of licenses, 47 U.S.C. §§ 303(f), 303(m), 312 and 316.

regulation by the Commission and, therefore, subject to regulation by the states.[48] An assertion of plenary Commission jurisdiction over CATV based solely upon the language of Sections 1 and 2(a) must assume that Congress was wholly unconcerned with problems relating to the appropriate areas of state and federal regulation over non-common carrier wire communication. This assumption flies in the face of its disclosed and explicit concern with respect to radio and common carrier regulation.

No such similar panoply of substantive and procedural provisions may be found in the Act with respect to wire communication engaged in by non-common carriers. The general regulatory provisions relied upon by the petitioners qualify the power granted with limitations such as "not inconsistent with this Act, as may be necessary in the execution of [the Commission's] *functions*" (Section 4(i)); "not inconsistent with law as it may deem necessary . . . to carry out the *provisions* of this Act" (Section 303(f)); "or as may be necessary to carry out the *provisions* of this Act" (Section 303(r), emphasis added). However, with respect to non-common carrier wire communication there are no "provisions of this Act" or Commission "functions" defined elsewhere in the Communications Act to give meaning or limit to these general regulatory powers. And in the absence of any substantive and procedural authority or limitation, the Commission's argument is reduced to the contention that the Commission has the jurisdiction to regulate CATV, i.e., wire communication conducted by non-carriers, for such purposes and by such means as it may consider appropriate.

A further difficulty with the FCC's position is that it chooses from only one of the multitude of objectives contained in the Act, some of which relate to radio communication and some of which relate to common carriers, to provide the required standards. The *Second Report and Order*

[48] See note 30, *supra*.

D. The Commission's Claim to Regulatory Authority Over Non-Common Carrier Wire Communication Is Wholly Inconsistent With Its Historic Administrative Practice.[50]

The Government does not attempt to argue that the provisions of the Act it cites and which confer substantive powers upon the Commission, even when combined with the general regulatory provisions, authorize it to regulate activities or entities not otherwise subject to Commission jurisdiction. Nor can that contention be made. This is the essential holding of *Regents* v. *Carroll,* 338 U.S. 586 (1950), which confirmed the power of the Commission to require a radio licensee (i.e., a subject of its regulatory authority) to disaffirm a contract as a condition of renewal of license. However *Regents* also held that this authorized action of the Commission could not operate to prevent the other party to the contract—a non-licensee—from obtaining appropriate relief for the breach of contract. Indeed, if the law were otherwise it would operate to extend the Commission's jurisdiction to activities which may be so conducted as to have an incidental or even direct impact upon the Commission's allocation plan for off-the-air television service, but which are beyond the Commission's competence to regulate—e.g., the production and distribution of motion pictures, the activities of the press, broadcasting network practices,[51] or before the All-Channel Receiver Law, 47 U.S.C. § 303(s) (1964), was enacted, the shipment of television sets in commerce.

As the Commission usually points out, the inability until recently of most television sets to receive UHF signals

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[50] Microwave relay systems are clearly a form of radio communication. In consequence, cases dealing with Commission jurisdiction over such systems, e.g., *Carter Mountain Transmission Corp.* v. *FCC,* 321 F. 2d 359 (D.C. Cir.), *cert. denied,* 375 U.S. 951 (1963), and *Idaho Microwave, Inc.* v. *FCC,* 352 F. 2d 729 (D.C. Cir. 1965), are irrelevant. Moreover, in each case the microwave service involved was a common carrier.

[51] See *supra,* pp. 41-44.

epresented a formidable obstacle to the development of JHF broadcasting and therefore to effectuation of the Commission's assignment plan. However, the Commission nade no attempt to contend, as it has with respect to ATV, that interstate shipment of sets equipped to receive nly VHF affected and threatened to disrupt its plan for ff-the-air television service and therefore is subject to the Commission's general regulatory powers. Rather, as it id with respect to networks, and CATV it requested legisation, empowering it to deal with the problem. In so oing it frankly stated:

> In the Communications Act of 1934, Congress vested the Federal Communications Commission with the responsibility of making available to all people of the United States, an efficient and nationwide communications service, and certain authority to carry out these responsibilities. Our request for this legislation is an expression of our feeling that in the area of television reception systems, our present authority is not commensurate with our responsibilities . . .[52]

In sum, the Commission regards CATV as a form of ire communication, but not as one conducted by common rriers; since, as demonstrated above, no provisions of ie Act confer general regulatory authority over non-comon carriers engaged in wire communication, the Commison lacks authority over the subject matter.

Accordingly, if the Commission considers regulations appropriate it must seek authority and direction from Conress. And, in fact, after concluding that it lacked regulary authority in 1959, *CATV and Repeater Services,* 26 C.C. 403 (1959), the Commission did seek appropriate gislation. The continuing and repeated efforts to obtain

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[52] Hearings on H.R. 8031 Before the House Committee on Interstate and Foreign Commerce, 87th Cong., 2d Sess. 7-8 (1962).

such legislation are set forth in Appendix C hereto.[53] The Commission's failure to obtain such legislation strongly suggests a Congressional awareness and acquiescence in the Commission's 1959 determination that it lacked such jurisdiction.[54] This acquiescence is entitled to great weight *United States* v. *Leslie Salt Co.*, 350 U.S. 383, 396-397 (1956). See also *Norwegian Nitrogen Products Co.* v *United States*, 288 U.S. 294 (1956).

The precise question here presented is whether non-microwave CATV may, as a form of wire communication conducted by non-common carriers, be regulated by the Commission pursuant to the Communications Act. It is submitted that the foregoing discussion amply supports the conclusion that the Communications Act confers no general regulatory authority over such wire communication upon the Commission and that, therefore, CATV is not subject to such regulation.

This conclusion obviously does not preclude an act of Congress conferring regulatory authority over CATV upon the Commission or some other body. Moreover, such legislation would supply answers to a host of questions which an assumption of plenary jurisdiction under Sections 1 and 2(a) give rise, including: Shall CATV be licensed and if so by whom and for what period? Shall CATV systems pay a franchise fee or rather, as in broadcast, shall the license be granted free? Shall the rates charged by CATV to the

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53 The Commission's description of these efforts through the 88th Congress are set forth at note 5, *supra*. Appendix C also describes the legislative treatment of CATV in the 89th Congress and discloses that nothing has since occurred to indicate the existence of any different Congressional view.

54 Such efforts to obtain legislation are pursuant to the mandate of Section 4(k)(1) of the Act to make annual reports to Congress on "such information and data collected by the Commission as may be of value in the determination of questions connected with the legislation of interstate and foreign wire and radio communication and radio transmission of energy" and Section 4(k)(5) to make "specific recommendations to Congress as to additional legislation which the Commission deems necessary or desirable."

viewer be regulated and if so, by whom and upon what basis?

Although the Commission has undertaken to answer some of these questions and refrained from answering others, its claim to plenary jurisdiction necessarily involves a claim of authority to answer all. The answers which it has furnished have been supplied without any statutory guidance or direction and are at variance with the explicit directions of Congress in conferring authority on the Commission under Titles II and III.

The Commission's Memorandum Opinion and Order here involved (R. 0015-0018) cannot be supported by resort to Sections 4(i) and 303(r) which are general regulatory provisions of the Communications Act.

First, this contention would assume that the Commission does have authority to regulate non-microwave CATV systems and the argument would fail in any event if, as argued, *supra,* the Commission does not have such authority.

The powers which the Commission reads into Sections 4(i) and 303(r) could affect far more than CATV, and could well govern other activities subject to regulation under the Communications Act. Sections 4(i) and 303(r) of the Communications Act are framed in language familiar in statutes conferring conventional powers upon an administrative agency. The general language of these sections requires that this question be tested in the light of the structure of the Act and its legislative history, rather than by sweeping cliches of statutory interpretation which literally assume the answer to the question presented.

Section 4(i), 47 U.S.C. § 154(i) (1964), provides as follows:

> "(i) The Commission may perform any and all acts, make such rules and regulations, and issue such orders, not inconsistent with this Act, as may be necessary in the execution of its functions."

Section 303(r), 47 U.S.C. § 303(r) (1964), provides that the Commission shall:

> "(r) Make such rules and regulations and prescribe such restrictions and conditions, not inconsistent with law, as may be necessary to carry out the provisions of this Act, or any international radio or wire communications treaty or convention, or regulations annexed thereto, including any treaty or convention insofar as it relates to the use of radio, to which the United States is or may hereafter become a party."

This task is made more difficult because the problem arises in the context of the Commission's asserted jurisdiction over CATV. As pointed out above the Communications Act is replete with explicit provisions which give meaning and limitation to the substantive and procedural powers granted to the Commission in areas it was expressly intended to regulate. For example, Section 316(a) of the Act, 47 U.S.C. § 316(a) (1964), expressly authorizes the Commission for stated reasons to "modify a station license or construction permit". This power to modify is available when the Commission has permitted a station to transmit signals in a manner that interferes with other legitimate uses of the radio spectrum. Nevertheless, Section 316(a) expressly requires that before the Commission modifies a license the licensee must be accorded a hearing if he so requests; and Section 316(b), 47 U.S.C. § 316(b) (1964), provides that at the hearing "both the burden of proceeding with the introduction of evidence and the burden of proof shall be upon the Commission."

It is therefore clear that the limiting impact of provisions of the Act relating to fields other than CATV would not permit the language of Sections 4(i) and 303(r) to operate in those fields with the same expansive and unlimited meaning claimed with respect to CATV. Since the Act does not deal with non-carrier wire communication, it does not contain similar sources of illumination and limitation. Para-

doxically, it is this very lack upon which the Government relies to support the Commission's claim that its authority to regulate CATV must encompass all that is necessary to prevent frustration of the Act's purposes.

As we have earlier noted, this is but another way of claiming that not only has Congress directed the Commission to regulate CATV, it has directed it to do so pursuant to any procedures the Commission sees fit to adopt. Such a contention is so patently at odds with the Administrative Procedure Act and standards for the delegation of powers that it must be rejected out of hand. Rather, it is necessary to look both to Sections 4(i) and 303(r) themselves and to a complex of relevant background in order to determine whether these provisions in fact confer the injunctive powers claimed.

The language of Sections 4(i) and 303(r) evidence no intention to give to the Commission broad regulatory jurisdiction over industries or businesses not included otherwise within the scope of the Communications Act.[55] Indeed, the language justifies the conclusion that these sections are basically enabling provisions intended to implement the specific provisions of the statute, not general grants of independent substantive authority which authorize the action taken in this case against Petitioner which makes no use of the radio spectrum. See *FCC* v. *American Broadcasting Co.*, 347 U.S. 284, 289-90 (1954). Their scope must be measured by reference to the express provisions and purposes contained in other sections of the Act. *Alabama Elec. Coop., Inc.* v. *SEC*, 353 F. 2d 905 (D.C. Cir. 1965), cert. denied, 383 U.S. 968 (1966). Thus, for example, these sections are validly employed to issue rules governing radio stations engaged in network broadcasting in view of the

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[55] The legislative history of Section 4(i) is set forth in Appendix D hereto; the legislative history of Section 303(r) is set forth in Appendix E hereto.

express authority conferred over such activities.[56] *National Broadcasting Co.* v. *United States,* 319 U.S. 190 (1943). Similarly, the sections are properly employed to implement the express Congressional policy against monopoly enunciated in the Communications Act by limiting the number of stations under common ownership or control. *Storer Broadcasting Co.* v. *United States,* 240 F. 2d 55 (D. C. Cir. 1957).[57]

The legislative history of Section 4(i) (set forth in Appendix D) demonstrates no intent by Congress to make a broad grant of the extraordinary powers here involved. Section 4(i) was derived from a provision of the Interstate Commerce Act, 49 U.S.C. § 17(3) (1951), which was designed to permit the ICC to control "the order and regulation of proceedings before it."[58] It was desired that the new commission have similar powers, and Section 4(i) was described "as more general in terms and may be sufficient in scope to cover rules of practice and forms of pleading." (Appendix D). The legislative history makes it abundantly clear that this section was conceived as limited and narrow in scope, and not as a source of administrative injunctive power.

Section 303(r) was not part of the original Communications Act of 1934, but was enacted in 1937 as a consequence

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[56] Section 303(i) of the Act, 47 U.S.C. § 303(i) (1964), provides that the Commission shall "Have authority to make special regulations applicable to radio stations engaged in chain broadcasting."

[57] See Section 313 of the Communications Act, 47 U.S.C. § 313 (1964).

[58] Subsection 4(i) of the Communications Act is contained in the Section entitled "Provisions Relating to the Commission" which sets forth and deals with such administrative matters as the number and salaries of the Commissioners; the location of the principal office; the employment of staff members; the fixing of payment of overtime to staff engineers; the making of expenditures for rent; expenses for supplies, books, periodicals, etc. The subsection immediately preceding 4(i) defines a quorum and provides: "The Commission shall have an official seal which shall be judicially noted." 47 U.S.C. § 154(h) (1964).

of unfortunate losses of life on the high seas in the *Morro Castle* and *Mohawk* disasters. The legislative history of the provision (set forth in Appendix E) shows that the only purpose of the provision was to extend the Commission's general regulatory and rule making powers to make it possible to give effect to "any international radio or wire communication convention" relating to safety at sea. Reliance on this provision to support sweeping and general injunctive powers by the Commission is wholly untenable.

I. THE COMMISSION CANNOT DEPRIVE THE PUBLIC OF ITS RIGHT TO RECEIVE AND SELECT TELEVISION PROGRAMS OF ITS CHOICE WITHOUT PROOF OF ADVERSE EFFECT UPON THE PUBLIC INTEREST

In this case, the Commission has simply rested its decision (R. 0015-0018), ordering Petitioner to black out certain television channels from its subscribers' view, upon its findings in the *Second Report and Order.* (R. 0016). Besides resting the Commission's authority on the tenuous grounds of the provisions discussed in Part I of this Argument, *supra,* which do not grant jurisdiction to the Commission over Petitioner who is not engaged in business as a common carrier by wire or in broadcasting in any form within the meaning of the Communications Act, the *Second Report and Order* bases the non-duplication rules (Appendix A, herein) upon the Commission's purpose "to insure that the local station is presented on the cable and to protect the local stations against the unfair competitive disadvantage and prejudicial effect to which they are subject by the duplication of their programming on the signals of distant stations." (*Second Report and Order,* 2 FCC 2d 25 in 1966, paragraphs 131-137; see, also, Opposition of the FCC and the United States to Petitioner's Motion For Stay in this case, pages 1 & 2).

The fallacy of the Commission's contention is that the Courts have held that there is no unfair competition in-

volved in a CATV system carrying either distant or loca
television stations' signals as they are received.[59] Th
FCC has not been given authority to overrule the Court
in matters involving questions of unfair competition. I
fact, the Communications Act does not grant authority t
the Commission to devise rules to present unfair competi
tion by anyone, let alone by persons not subject to the Com
mission's jurisdiction, such as Petitioner. This is au
thority which, if it exists at all in a Federal agency, i
placed under the jurisdiction of the Federal Trade Com
mission.

Furthermore, the Commission's efforts to protect th
local station is based upon the false premise that a tele
vision station bargains for exclusivity of network program
ming throughout its Grade B contour or coverage area
The fact is that a television station cannot under telev
sion network practices and FCC Rules bargain for exclu
sivity of network programs except in its principal com
munity, and it bargains only for the exclusive right t
broadcast, as against any other television stations, th
programs within the principal community which it serve
It does not obtain exclusivity against the reception c
programs by a CATV system's subscribers and copyrigh
holders have offered to bargain with CATV operators fc
the purchase of the rights to such reception, if such right
must be purchased by the CATV operator. If the Su
preme Court of the United States should uphold the d
cision of the lower courts in the case of *United Artist
Television, Inc.* v. *Fortnightly Corporation*,[60] CATV sy
tems will be liable for payment of copyright not only for th

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[59] *Cable Vision, Inc.* v. *KUTV, Inc.*, 335 F. 2d 348 (9th Cir. 1964), ce
den. 379 U.S. 989 (1965); *Intermountain Broadcasting & Television Corp.*
Idaho Microwave, Inc., 196 F. Supp. 315 (D. Idaho 1961).

[60] 255 F. Supp. 177 (S.D.-N.Y. 1966); 377 F. 2d 872 (2nd Cir. 1967
Fortnightly Corporation v. *United Artists Television, Inc.* on *certiorari* befc
the Supreme Court of the United States (Case No. 618), October Term, 19(

future reception of television programs but, under the statute of limitations in the Copyright Act, for three years prior to the time they are sued. Along with the penalties incurred for past non-payment of copyright, the costs of doing business will be phenomenal for the CATV operator.

This shows the tenuous position of the Commission in attempting to base its non-duplication rules upon the past and current practice of CATV systems under which they do not pay for programs received off-the-air, as distinguished from copyrighted programs which some systems originate in their studios and for which they pay copyright. Will the Commission then be able to right the situation and reimburse the CATV operator for his losses due to adherence to the Commission's non-duplication rules? Obviously, no.

The non-duplication rules are designed strictly to protect the television broadcasters and networks, without any proof being required by the Commission to the effect that they are injured financially or threatened to be injured financially to the extent that the public interest is adversely involved. (R. 30, 34).

The Commission itself has recognized that its Rules may have to be changed if the Supreme Court of the United States upholds the courts' decisions in the *Fortnightly* case (footnote 60, *supra*). In its *Second Report and Order,* the Commission stated:

> "In short, if the copyright suits are decided adversely to the CATV industry, we may, as stated in the First Report, have to revise our rules."[61]

Neither the Commission nor Intervenor, KVOS-TV, has alleged or found, let alone proven, that the operations of Petitioner have adversely affected KVOS-TV in a financial way. Neither have they alleged or found that the public

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[61] Second Report and Order (31 F.R. 4540), par. 108.

interest will suffer or is likely to suffer from Petitioner's operations. The *Second Report and Order* likewise contained no such proof. The National Cable Television Association, Inc. of Washington, D. C., the only national trade association for the CATV industry, for itself and its members, including Petitioner, has filed pleadings in the proceedings which led to the issuance of the *Second Report and Order* pointing out that no proof was adduced in those proceedings to the effect that broadcasters were injured to the extent that the public would be adversely affected, but the Commission issued the *Second Report and Order* nevertheless. In the Memorandum and Opinion in this case, it has ruled again that an argument that KVOS-TV would not be prejudiced by a grant of waiver even if true would not be persuasive. (R. 0015, para. 2).

The Commission's Memorandum Opinion and Order in this case contradicts the holding of the Courts that the burden of proof is on the complaining television station to show that the public interest, as distinguished from its own pecuniary interests, will be hurt.[62]

Petitioner averred that insistence by the Commission upon imposing these arbitrary and capricious rules will cause Petitioner to lose many subscribers and thus be deprived of its property without due process of law in violation of the Fifth Amendment to the Constitution of the United States. Furthermore, the Commission's Rules, if upheld would require Petitioner to spend several thousands of dollars in obtaining personnel in order to switch the programs off and black out the channels or to purchase an expensive time-clock which is designed to do this automatically, or to do both of these things. Petitioner pointed out that time-clocks are not reliable and they can involve Petitioner unwillingly and unwittingly in a violation of the

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62 *Carroll Broadcasting Co.* v. *FCC*, 103 U.S. App. D.C. 346, 258 F. 2d 4 (1958).

Rules and subject it to punishment by the FCC. (R. 31 & 32). All of Petitioner's allegations, such as that Intervenor, KVOS-TV, did not need this protection and that the public would be deprived of certain programs of its choice were supported by affidavit, as required by the Commission's Rules. Intervenor's Opposition did not have an affidavit attached to it, as required by the Commission's Rules. The Commission's Memorandum Opinion and Order in this case is not based upon evidence in the Record and deprives Petitioner and the public of due process of law contrary to the Fifth Amendment to the Constitution of the United States. (R. 36).

III. THE COMMISSION CANNOT APPLY ITS NON-DUPLICATION REGULATIONS TO PETITIONER WHICH WAS IN OPERATION BEFORE THE COMMISSION ASSERTED ITS JURISDICTION

Again, if it were conceded, *arguendo*, that the Commission could regulate CATV systems, the Commission cannot apply its regulations to a CATV system which was in operation before the Commission asserted its jurisdiction in a way which causes the CATV system to lose subscribers or which threatens its continued existence.

Petitioner was in operation since May of 1960. (R. 21). At that time the Commission had not attempted to exercise jurisdiction over CATV systems and had actually refused to regulate them. In the year before Petitioner began the operation of its CATV system, the Commission had decided unanimously that it did not possess jurisdiction to regulate CATV systems. (R. 21 & 22).

Petitioner had a right to rely upon the Commission's action in agreeing with its subscribers to carry the signals of distant television stations. After Petitioner has incurred expenses of many thousands of dollars in constructing and operating a CATV system, the Commission cannot apply to his business the restriction of blacking out certain

distant television signals and exposing Petitioner to th loss of many thousands of dollars and possibly eventual to financial demise. This is a deprivation of proper without due process of law contrary to the Fifth Amen ment to the Constitution of the United States.[63] This co clusion follows, regardless of whether the Commission ca exercise this autority over CATV systems which went in operation after the effective date of the *Second Report an Order.*

IV. THE COMMISSION CANNOT ABRITRARILY DISCRIMINAT AGAINST PETITIONER'S SUBSCRIBERS AND DEPRIV THEM OF THE OPPORTUNITY TO VIEW TELEVISIO PROGRAMS AVAILABLE TO OTHERS IN THE SAM COMMUNITY

Even if the Commission did have jurisdiction over CAT systems, it could not arbitrarily discriminate betwee CATV subscribers and the general public by prohibitin the CATV subscribers only from viewing certain dista television programs available to all in the CATV com munity. Still, that is precisely what the Commission Memorandum Opinion and Order in this case accomplishe

The Commission knows that when a CATV subscriber connected to the CATV system, he generally expresses wish to have his roof-top antenna disconnected from h television set and to have the antenna removed. This l does for aesthetic reasons, because he prefers not to hav an ugly antenna on his roof; for reasons of safety, becau he does not run the risk of the antenna falling and dama ing his roof or injuring a passerby or an occupant; fo reasons of economy, because he can often obtain a reductio in his home insurance. When a CATV operator receiv all the local stations and all the distant stations which l

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[63] See concurring opinion in *Southwestern Cable Co. et al.* v. *United Sta of America and Federal Communications Commission,* 378 F. 2d 118—C. 9, 1967.

can receive, as Petitioner does, no one is injured by the antenna being removed.

However, the Commission's non-duplication rules work a real hardship on the CATV subscriber, as well as the CATV operator, when all the television signals encompassed by the Commission's Rules are receivable in the CATV community with the use of regular antennas, such as rabbit-ears or roof-top antennas. This is the situation in Port Angeles, Washington. In such a case, the non-duplication rules do not prevent the public from viewing the distant stations' television signals by use of roof-top or other antennas, but they deprive solely the CATV subscribers from viewing these distant signals by causing the CATV operator to black out certain signals from distant television stations. This causes the CATV operator to lose many subscribers and, in communities like Port Angeles where all the signals can be received off-the-air, it can cause the CATV system's demise.

Furthermore, even if the non-duplication rules were sustainable in principle where a CATV system is denied the right to receive the signals of television stations which are not receivable in the CATV community except via the CATV system, they cannot logically be applied where the result of the rules is nil. The rules will not accomplish the result they were designed to achieve. If CATV subscribers in Port Angeles cannot view the programs of Seattle television stations on their sets when connected to the cable, they will simply revert to the use of roof-top antennas and settle for a viewable though inferior picture. The result will not be to protect Intervenor, KVOS-TV, but it will nevertheless injure financially Petitioner. Duplication by competing television stations will continue. The non-duplication rules under the circumstances are discriminatory as against Intervenor and its subscribers and violative of due process of law in contravention of the Fifth Amendment to the Constitution of the United States. The

public's right to view television programs of its choic cannot be curtailed by the Government on this specious pretext. *Weaver* v. *Jordan,* 411 Pac. 2d 289 (1966).

The Commission's policies are discriminatory in anothe regard. The Commission has allowed KIRO-TV to instal a translator which beams its programs into Port Angele without requiring the translator to refrain from duplicat ing KVOS or any other television stations' programs. A translator broadcasts and it can reach many more person than Petitioner's CATV system. Apparently the Commis sion and KVOS-TV do not fear this fragmentation of th audience of KVOS-TV or of other television stations, be cause the Commission has made the grant of a license t the translator and KVOS-TV has apparently not contested the grant. This discrimination is inexplicable and does no meet the due process of law standard of the Fifth Amend ment to the Constitution of the United States. Is th answer that the operators of the translator and of KVOS TV are fellow broadcasters?

V. THE COMMISSION CANNOT IN COMBINATION WITH INTER VENOR PREVENT ADVERTISING FROM DISTANT TELEV SION STATIONS FROM BEING RECEIVED BY CATV SUB SCRIBERS IN PORT ANGELES

The Commission's non-duplication rules involve pro hibiting the advertising from distant television station (from two Seattle stations in this case) from being re ceived in Port Angeles, Washington, *only if local broad caster requests non-duplication protection.* The Commi sion knows that some of the commercials from the tw Seattle stations will not be able to be received by CAT subscribers, if the non-duplication rules are enforced again Petitioner and that only Invervenor's (KVOS-TV's) com mercials will be viewed by CATV subscribers when th same programs are being shown by KVOS-TV and by on or the other Seattle TV stations involved.

The Commission's policy in not permitting the comme cials from KING-TV or KIRO-TV from being received

Port Angeles conflicts with the antitrust laws of the United States and with the Commission's own policies, as evidenced in Public Notice B of the FCC, dated February 28, 1968, and attached hereto as Appendix F.

The only difference is that in the case discussed in Appendix F hereto, the radio station was conspiring with local automobile dealers to keep the advertising of distant stations out of the community, while the FCC in this case is in a like position with Intervenor, KVOS-TV, in keeping the distant television stations advertising from coming into the community, if the local station (KVOS-TV) requests this to be done.

The Court's attention is called to the fact that it is the request from the television station tha triggers the requirement that the CATV system does not carry certain programs, including the advertising from the distant television stations, not a finding by the Commission that this is required in the public interest.

If the local television station does not request the application of the rule, then the CATV system can do what it wishes and apparently the "public interest" factor vanishes into thin air. This requirement is in violation of the antitrust laws of the United States[64] which are made expressly applicable to "interstate or foreign radio communications" by Section 313 of the Communications Act.

I. THE COMMISSION CANNOT IMPOSE UPON A NON-LICENSEE THE RESTRICTIONS IMPOSED UPON ITS LICENSEES AND DENY TO A CATV OPERATOR THE PROCEDURAL PROTECTION AFFORDED TO LICENSEES UNDER THE COMMUNICATIONS ACT

Part I of this Argument establishes that the Commission has relied erroneously upon certain irrelevant provisions of the Communications Act to extend its jurisdiction over CATV systems without statutory authority.

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[64] The Sherman Act, 15 U.S.C. Secs. 1 & 2.

Under the *Second Report*, the Federal Communications Commission assumed jurisdiction to regulate the CATV industry under the Communications Act of 1934:

> "Authority for adoption of these rules is contained in Sections 1, 4(i), 303, 307(b), 308 and 309 of the Communications Act. We wish to stress particularly the provisions of Section 1 that the general purpose of the Act is to 'maintain the control of the United States over all the channels of interstate and foreign radio transmission . . . under licenses granted by federal authority; of Section 303(h), 'to establish areas or zones to be served by any station'; of Section 307(b), to make 'a fair efficient and equitable distribution of radio service' among the several states and communities; of Section 303(g), to study new uses of radio and generally encourage the larger and more effective use of radio in the public interest, and Section 303(s), the 'all-channel receiver' section."

Under Section 309(e) of the Communications Act of 1934, as amended,[65] in any application for authority addressed to the FCC in which a substantial and material question arises, the application must be formally designated for hearing. This procedure is applicable to all licensees. Upon assumption of jurisdiction to regulate the CATV industry the FCC has inferentially equated operators of CATV with licensees and as such CATV operators must be accorded the same procedural protection as licensees. It would certainly be violative of due process to impose upon CATV operators the operating restrictions imposed upon licensees while simultaneously denying them the procedural protections of Section 309(e) of the Communications Act because they are not licensees. Moreover, it is quite clear that CATV operators are not licensees under the Communications Act of 1934, as amended, and the FCC does not so regard them. However, the FCC cannot control a non-licensee without providing the non-licensee

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[65] 47 U.S.C. 309(e).

rtain fundamental procedural protections including the ourtesy of considering the evidence submitted.

In denying a Petition for Waiver of the CATV Rules of te FCC without evidentiary hearing as to the substantial isues of fact presented, Petitioner has been denied due rocess of law required by the Fifth Amendment.

The action of the FCC in denying an application for aiver filed by an operator of a CATV system without hear-ig when substantial issues of fact are involved, is an abitrary and capricious action contrary to the public iterest. Under the Administrative Procedure Act, as aended, 60 Stat. 237, 5 U.S.C. 706(2)(a), this reviewing ehrt is empowered to set aside agency actions, findings ad conclusions found to be arbitrary and capricious.

The Commission's CATV rules specifically deny the r ht to a full evidentiary hearing to either petitioner or oponent whether substantial or material questions of fat are raised or not, unless the Commission on its own n tion determines to set the Petition for hearing.[66] The Cmmission establishes itself as both trier of fact and of la—which it may do, but it may not do this through tl expedient of denying the right to cross-examine the oponents evidence merely because such a process creates a simpler and more expeditious procedure.[67]

The plain fact of the matter is that the Courts, as a mtter of fundamental due process, will not permit restraint on a party's property rights without the prior hearing and pticularly where freedom of speech may be affected adersely. *A Quantity of Books* v. *Kansas*, 378 U.S. 205 (164). In the cited case, the Supreme Court ruled that a eizure order against allegedly obscene books was con-

[66] 47 C.F.R. § 74.1109(f). Appendix A herein.

[67] *National Broadcasting Co.* v. *FCC*, 362 F. 2d 946 (D.C. Cir. 1966; *America Broadcasting Co.* v. *FCC*, 179 F. 2d 437 (D.C. Cir. 1950).

stitutionally deficient in not first allowing the distributo
of said books an adversary hearing. Surely, if a restrai
against allegedly obscene books cannot be issued witho
prior hearing, then *a fortiori,* the Commission's flagrant
tempt to restrict the carriage of television signals and
resultant diversified programs of entertainment, news,
litical broadcast, and education materials must be dismiss
Even apart from fundamental First Amendment cons
erations, the property rights of Petitioners must be p
tected under elementary principles of due process as
forth in the Fifth Amendment.

CONCLUSION

For the foregoing reasons, it is urged that the Co
set aside, vacate, annul and determine to be errone
and invalid the *Second Report and Order* and the s
Order of the Federal Communications Commission deny
Petitioner a waiver of Section 74.1103 of its Rules
Regulations (Appendix A herein).

If the Court finds that the Commission has jurisdict
over CATV systems, that the Court suspend the *Sec*
Report and Order and order the Commission to reopen
proceedings to obtain evidence, if available, in orde
make a finding of adverse economic impact by CA
systems on television broadcast stations to the extent
injuring the public interest before putting its Rules
Regulations thereunder into effect or that it make s
a finding of adverse economic impact on a case by
basis upon substantial evidence of record before depri
the public of the programs of television stations.

At the very least, that the Court remand the ins
proceeding to the Commission with directions to desig

the proceeding for a full evidentiary hearing of the substantive issues of fact involved.

To grant such other relief as to this Honorable Court may seem just and proper.

Respectfully submitted,

PORT ANGELES TELECABLE, INC.

By /s/ E. STRATFORD SMITH
E. Stratford Smith

By /s/ ROBERT D. L'HEUREUX
Robert D. L'Heureux

April 24, 1968

CERTIFICATE

We certify that in connection with the preparation of this Brief, we have examined Rules 18, 19 and 39 of the United States Court of Appeals for the Ninth Circuit, and that, in our opinion, the foregoing brief is in full compliance with those rules.

/s/ E. STRATFORD SMITH
E. Stratford Smith

/s/ ROBERT D. L'HEUREUX
Robert D. L'Heureux

Attorneys

APPENDIX

APPENDIX A

Rules and Regulations of the Federal Communications Commission

§ 74.1103 Requirement relating to distribution of television signals by community antenna television systems. [47 C.F.R. 74:1103]

No community antenna television system shall supply to its subscribers signals broadcast by one or more television stations, except in accordance with the following conditions:

(a) *Stations required to be carried.* Within the limits of its channel capacity, any such CATV system shall carry the signals of operating or subsequently authorized and operating television broadcasts and 100 watt or higher power translator stations in the following order of priority, upon the request of the licensee or permittee of the relevant station;

(1) First, all commercial and noncommercial educational stations within whose principal community contours the system operates, in whole or in part;

(2) Second, all commercial and noncommercial educational stations, within whose Grade A contours the system operates, in whole or in part;

(3) Third, all commercial and noncommercial educational stations within whose Grade B contours the system operates, in whole or in part;

(4) Fourth, all commercial and noncommercial educational television translator stations operating in the community of the system with 100 watt or higher power.

(b) *Exceptions.* Notwithstanding the requirements of paragraph (a) of this section,

(1) The system need not carry the signal of any station, if (i) that station's network programming is substantially duplicated by one or more stations of higher priority, and

(ii) carrying it would, because of limited channel capacity, prevent the system from carrying the signal of an independent commercial station or a noncommercial educationa station.

(2) In cases where (i) there are two or more signals of equal priority which substantially duplicate each other, and (ii) carrying all such signals would, because of limited channel capacity, prevent the system from carrying the signal of an independent commercial station or a noncommercial educational station, the system need not carry al such substantially duplicating signals, but may select among them to the extent necessary to preserve its ability to carry the signals of independent commercial or noncommercial educational stations.

(3) The system need not carry the signal of any television translator station if (i) the system is carrying the signal of the originating station, or (ii) the system is within the Grade B or higher priority contour of a station carried on the system whose programming is substantially duplicated by the translator.

(c) *Special requirements in the event of noncarriage.* Where the system does not carry the signals of one or more stations within whose Grade B or higher priority contour it operates, or the signals of one or more 100 watt or higher power translator stations located in its community, the system shall offer and maintain, for each subscriber, an adequate switching device to allow the subscriber to choose between cable and non-cable reception unless the subscriber affirmatively indicates in writing that he does not desire this device.

(d) *Manner of carriage.* Where the signal of any station is required to be carried under this section,

(1) The signal shall be carried without material degradation in quality (within the limitations imposed by the technical state of the art);

(2) The signal shall, upon request of the station licensee or permittee, be carried on the system on the channel on which the station is transmitting (where practicable without material degradation); and

(3) The signal shall, upon the request of the station licensee or permittee, be carried on the system on no more than one channel.

(e) *Stations entitled to program exclusivity.* Any such system which operates, in whole or in part, within the Grade B or higher priority contour of any commercial or noncommercial educational television station or within the community of a fourth priority television translator station, and which carries the signal of such station shall, upon request of the station licensee or permittee, maintain the station's exclusivity as a program outlet against lower priority or more distant duplicating signals, but not against signals of equal priority, in the manner and to the extent specified in paragraphs (f) and (g) of this section.

(f) *Program exclusivity; extent of protection.* Where a station is entitled to program exclusivity, the CATV system shall, upon the request of the station licensee or permittee, refrain from duplicating any program broadcast by such station, on the same day as it's broadcast by the station, if the CATV operator has received notification from the requesting station of the date and time of its broadcast of the program and the date and time of any broadcast to be deleted, as soon as possible and in any event no later than 48 hours prior to the broadcast to be deleted. Upon request of the CATV system, such notice shall be given at least eight days prior to the date of any broadcast to be deleted.

(g) *Exceptions.* Notwithstanding the requirements of paragraph (f) of this section,

(1) The CATV system need not delete reception of a network program if, in so doing, it would leave available

for reception by subscribers, at any time, less than th programs of two networks (including those broadcast b any stations whose signals are being carried and whos program exclusively is being protected pursuant to th requirements of this section);

(2) The system need not delete reception of a netwo program which is scheduled by the network between t hours of 6 and 11 p.m., Eastern Time, but is broadcast b the station requesting deletion, in whole or in part, ou side of the period which would normally be considere prime time for network programming in the time zo involved;

(3) The system need not delete reception of any pr gram consisting of the broadcast coverage of a speech other event as to which the time of presentation is special significance, except where the program is bei simultaneously broadcast by a station entitled to progra exclusivity; and

(4) The system need not delete reception of any pr gram which would be carried on the system in color b will be broadcast in black and white by the station reque ing deletion.

§ 74.1109 Procedures applicable to petitions f waiver of the rules, additional or different requi ments and rulings on complaints or disputes. [47 C.F 74:1109]

(a) Upon petition by a CATV system, an applicant, p mittee, or licensee of a television broadcast, transla or microwave relay station, or by any other interested p son, the Commission may waive any provision of the ru relating to the distribution of television broadcast sign by CATV systems, impose additional or different requi ments, or issue a ruling on a complaint or disputed questi

(b) The petition may be submitted informally, by letter, but shall be accompanied by an affidavit of service on any CATV system, station licensee, permittee, applicant or other interested person who may be directly affected if the relief requested in the petition should be granted.

(c) (1) The petition shall state the relief requested and may contain alternative requests. It shall state fully and precisely all pertinent facts and considerations relied upon to demonstrate the need for the relief requested and to support a determination that a grant of such relief would serve the public interest. Factual allegations shall be supported by affidavit of a person or persons with actual knowledge of the facts, and exhibits shall be verified by the person who prepares them.

(2) A petition for a ruling on a complaint or disputed question shall set forth all steps taken by the parties to resolve the problem, except where the only relief sought is a clarification or interpretation of the rules.

(d) Interested persons may submit comments or opposition to the petition within thirty (30) days after it has been filed. Upon good cause shown in the petition, the Commission may, by letter or telegram to known interested persons, specify a shorter time for such submissions. Comments or oppositions shall be served on petitioner and on all persons listed in petitioner's affidavit of service, and shall contain a detailed full showing, supported by affidavit, of any facts or considerations relied upon.

(e) The petitioner may file a reply to the comments or oppositions within twenty (20) days after their submission, which shall be served upon all persons who have filed pleadings and shall also contain a detailed full showing, supported by affidavit, of any additional facts or considerations relied upon. Upon good cause shown, the Commission may specify a shorter time for the filing of reply comments.

(f) The Commission, after consideration of the pleadings, may determine whether the public interest would be served by the grant, in whole or in part, or denial of the request, or may issue a ruling on the complaint or dispute. The Commission may specify other procedures, such as oral argument, evidentiary hearing, or further written submissions directed to particular aspects, as it deems appropriate. In the event that an evidentiary hearing is required, the Commission will determine, on the basis of the pleadings and such other procedures as it may specify, whether temporary relief should be accorded to any party pending the hearing and the nature of any such temporary relief. Where a petition involves new service to subscribers (other than service coming within the provisions of § 74.1107(a) of this chapter), the Commission will expedite its consideration and promptly issue a ruling either on the merits of the petition or on the interlocutory question of temporary relief pending further procedures.

(g) Where a request for temporary relief is contained in a petition with respect to service coming within the provisions of § 74.1107(d) of this chapter, opposition to such request for temporary relief shall be filed within ten (10) days and reply comments within seven (7) days thereafter. The Commission will expedite its consideration of the question of temporary relief.

APPENDIX B

Opinion of Commissioner Loevinger Concurring in Part and Dissenting in Part in Dockets Nos. 14895, 15233, and 15971

The Commission is issuing today a report and order, a notice of inquiry and of proposed rulemaking, a memorandum on jurisdiction and the text of new rules all of which relate to the problems posed by community antenna television systems, commonly referred to as CATV's. These documents aggregate over 120 pages and set forth such a mass of detail that the outlines of the problems, as well as the basic issues, are somewhat obscured, if not wholly submerged. Accordingly, it seems worth while to restate very briefly and simply what the problems and the issues are, in order to indicate my points of agreement and disagreement with the majority.

A CATV is a system comprising an antenna for receiving television signals, and cables and auxiliary apparatus (such as amplifiers) for carrying the signals received into a number of receiving sets. CATV's are about as old as commercial television itself, the first systems having been started as early as 1950. CATV's have been developed in order to fill the wants of those who either because of distance or terrain were unable to get television signals off the air in satisfactory quality or numbers. (See articles in Television Magazine, June 1962, September 1964, and April 1965.)

For a variety of reasons, some of them related to actions of the FCC, the commercial CATV business has developed through independent companies which transmit or relay the signals and other companies which distribute the signals to subscribers. Typically there will be an antenna on some high point near a community which receives the signals of a number of TV stations. These signals will be transmitted either by microwave relay or by coaxial cable to a point in the settled part of the community. At this point the relay company will deliver the signals to the

CATV operating company. The latter will maintain and operate the system which distributes the signals over wires to the homes of subscribers within the community. In some cases the relay company will deliver signals to several CATV companies.

CATV's were started in mountainous areas of Pennsylvania and Oregon where television reception was either poor or nonexistent for many communities. As it appeared that CATV's were able to bring good reception and offer a variety of services to communities far outside the major metropolitan centers, the companies spread to more communities and got more subscribers. Over the years, as television has grown in both numbers of broadcasting stations and numbers of homes, CATV has also grown, although by no means in proportion. In rough figures there are now about 566 television stations in the United States covering some 266 markets (Television Magazine, April 1965, p. 85). Over 52 million U.S. households have television receivers, which is 92 percent of all of the U.S. households. The CATV industry today has about 1,300 operating systems serving about 1.2 million homes (Seiden report to the FFC, p. 1). CATV's are concentrated largely in one- or two-station markets. Most systems are fairly small in size, about 90 percent having fewer than 3,000 subscribers and the average having about 655 subscribers. Most CATV's deliver five signals to their subscribers although some deliver as few as three and some as many as seven or more. However, the number and size of CATV's is growing and CATV systems are being offered to more communities, and to larger communities.

The proliferation of CATV's is regarded by many in the television business as an economic threat. It is said that while the broadcaster has the burden and expense of providing programming which the audience gets without payment and which must be supported by advertising, the CATV operator simply delivers the broadcasters' programing to subscribers and receives payment from them

This is said to constitute unfair competition. It is also alleged that the competition is not only unfair but destructive in some situations, because CATV's deliver the signals of far-distant stations and deliver a relatively large number of signals to relatively small communities in which the audience is not large enough to support a number of stations. CATV's create the anomaly that some relatively small towns are provided with a greater choice of television programing over the local CATV than many larger cities have in the absence of CATV.

These circumstances have created a demand by many broadcasters for the FCC to take jurisdiction over CATV's and to institute measures to protect television broadcasters against competition of CATV's. As will be pointed out in some detail below, the FCC has instituted several proceedings and investigations relating to this matter. However, heretofore it has not taken any definitive action of general significance. While there has been some question as to the extent of the FCC jurisdiction, the Commission has had undisputed jurisdiction with respect to licensing microwave transmitting facilities for those relay companies that carry TV signals by microwave. The manner of exercising that jurisdiction is one of the matters that has been bitterly disputed and that is involved in the present proceedings.

By the documents which the Commission is now promulgating it adopts a series of measures which represent the conclusion of the Commission majority as to the action that the Commission should take in this field. There are four significant measures involved:

> First, the Commission rules that CATV's must carry the signals of all local television stations without material degradation. The Commission exercises power over the CATV's by requiring licensed microwave relay companies to require their customers to comply with the Commission conditions.

Second, the Commission rules that the relay companies must require the CATV's which they serve to avoid the delivery to their customers of the television signals of any programs which duplicate the program of any local station. This rule of nonduplication does not refer merely to simultaneous duplication, but requires CATV's to avoid presenting any duplicate program either 15 days before or 15 days after the date of broadcast by a local station. Thus, this rule provides that the CATV's served by the relay companies subject to the rule must avoid duplication of any local TV program for a period of 30 days.

Third, the Commission asserts jurisdiction over all CATV relay companies and systems, including those that are wholly intrastate and that transmit signals entirely by wire. Although this conclusion is called tentative, the background demonstrates that there is no practical possibility of dissuading the Commission from this conclusion. The Commission gives notice that the substantive measures already adopted will be extended to the full limits of this asserted jurisdiction as soon as the procedural amenities can be completed.

Fourth, the Commission institutes an "inquiry" seeking further comment on more than a dozen and a half questions, all of them relating to the possibility of imposing further restrictions upon the operations of CATV's.

It seems to me that in its approach to the CATV problem the Commission is doing the wrong thing for the wrong reason in the wrong manner to deal with the wrong problem. It is thereby erecting only a gossamer barrier against the evils which it fears.

The Commission is doing the wrong thing when it seeks to control, directly or indirectly, the specific programs which shall be presented to the audience. The Commission

is acting for the wrong reason because it seeks only to limit competition. The Commission is proceeding in the wrong manner because it is acting to extend its jurisdiction beyond statutory language and contrary to precedent. The Commission is dealing with the wrong problem because it concentrates attention only on the single matter of competition for listener attention and substantially disregards more important and more basic problems. Finally, the Commission is erecting only a gossamer barrier against feared evils because the actions taken and proposed are not only wrong but must ultimately prove to be ineffective. Assuming that the Commission will assert jurisdiction over all CATV companies, and will impose nonduplication rules, and disregarding the risk that the action will be set aside for lack of jurisdiction, at best these rules will give slight and marginal protection against competition, and at worst they will be wholly overturned on the whim of some future Commissioner. This is not a sound basis on which to build an industry.

Basically I concur in two of the four rulings made by the Commission today and dissent from two of the four. I agree that the Commission should, within the scope of its jurisdiction, require CATV carriage of local television stations without degradation, and that it should implement the rule so as to insure its effectiveness. I have no disagreement with the substance of the rules regarding carriage of local stations. I also agree that the Commission should undertake an inquiry into the role and scope of CATV's, although I have some reservations as to the inquiry now initiated by the Commission. I disagree with the nonduplication rule which I believe is an improper attempt to limit competition by controlling programing; and I disagree with the Commission's attempt to extend its jurisdiction without congressional authorization.

While I heartily agree that the Commission should conduct a sweeping inquiry into the role and scope of CATV's

in the field of mass communications, it seems to me tha the present inquiry is too little and too late. It is too littl because it does not deal with fundamentals. Many of th important issues in the field are mentioned in the notic of inquiry, but they are scattered through the somewha diffuse discussion in random fashion, even occurring i footnotes. But the basic issues are not mentioned. Thes are what the function of CATV's should be, and what ulti mate mode and system can be developed or encourage to provide the greatest service to the greatest number. I various paragraphs of the instant orders and opinion CATV's are discussed as being ancillary or subsidiary fa cilities to broadcasting and as being a service competitiv with broadcasting. These concepts seem inconsistent t me, and differing regulatory consequences flow from then For example, if the services are truly competitive, the there is some reason to prohibit or discourage joint owne ship of broadcasting facilities and CATV's. On the othe hand, if the services are ancillary, then that reason doe not exist, and broadcasters should be permitted, and pe haps encouraged, to own CATV's. At the present time th Commission is deferring action on a large number of broa cast license renewals because the licensees also own CAT facilities. This action seems inconsistent with some of th positions adopted in these proceedings.

In any event, the present inquiry is too late because th Commission has already formed its opinion on this subje I believe the Commission should make its investigatio and conduct its inquiry before reaching its conclusion rather than afterward. The documents issued today plain show that the Commission and its staff have strong an fixed views regarding the subordinate place of CATV in the mass communications system, and these views a not likely to be much influenced by anything that can b presented to the Commission in the course of the inquir Even if some Commissioners hold such views, it wou seem to me to be more courteous, more productive an

more wise to refrain from officially promulgating them until he formal "inquiry" has been completed.

In any event, I cannot agree that it is proper for the FCC to determine, either directly or indirectly, which programs shall be carried by a CATV system. It seems to me that the basic issue is whether the Commission should employ economic and engineering rules in order to achieve economic and engineering objectives, or should exert direct control over the substance of programing in an effort to achieve its objectives. The method of selective program control, which the majority adopts here, will beget future problems and more control. Problems will arise because of delay, changes in plans for broadcasting of particular programs, the requirements of section 315 and "fairness," and section 317, and other provisions, to pose only a few examples that can readily be foreseen of the numerous problems likely to arise under this rule. Suppose that a local station advises a CATV that the latter cannot carry some program because the station intends to carry it, and then the station, for whatever reason, does not carry the program? As a practical matter, the CATV will not have any other opportunity to carry the program once the date of its broadcast has passed. Will the FCC then require the local station to carry this program? Will that depend upon the Commission's determination of the value of the particular program? We know from experience that documentary and political programs are those most likely to be delayed or omitted. Will the Commission permit these programs to be taken off the CATV at the whim of the local station owner without insuring that he does carry them? It seems unlikely to me that the majority will be willing to do this. However, I doubt that those broadcasters who now clamor for a Commission rule on nonduplication will welcome this new grounds for Commission regulation of their programing.

Even more provocative questions are posed with respect to political programing. Support a distant station, carried

on a local CATV, is carrying a series of political program on a presidential election which is balanced as between th major parties. A local station decides to carry those ne work programs presenting the views of one of the tw major parties. It notifies the CATV which then blank out these programs on its circuits. The local station wi then have to balance out its own programing by presentin the views of the other major party over its broadcastin facilities. But the programs of the distant station carrie on the local CATV will be unbalanced since they will prese only the programs presenting the views of one party. Mo important, the local public will then have an unbalance presentation since it will have the programs favoring o party presented over two stations on the local syste whereas the programs favoring the other party will b presented over only one of the local channels and the will be only half as many of the latter. This is obvious a device that could easily be used to give the public a ve biased political presentation during a campaign. Is t FCC then going to supervise CATV systems to see th their programs comply with all of the requirements section 315 and "fairness"? How will this be accomplishe Will the FCC require program origination by CATV These and a host of other problems flow directly and i evitably from the approach adopted here. To say that a single situation is unlikely is not an adequate respon The records of the FCC and its own attempts to influen programing are eloquent testimony that situations such those suggested, and others more bizarre and unusu do occur and recur.

It should be noted that the rules now adopted by t Commission are based, in significant part, upon its co cern for the preservation of "local live" programing, a that the notice of inquiry suggests that the protection wh the Commission is now bestowing upon broadcasting s tions is likely to be "accompanied by a concomitant du on the part of the station" to provide "local live" p

raming. (See notice of inquiry, par. 53.) Thus, the non-
uplication rule is not only a direct intrusion into the pro-
raming area through control of CATV's, but is also
nother argument to buttress the case for further Com-
ission control of the programing of broadcasters. Believ-
ng, as I do, that the Commission should not seek to control
rogram content in the field of broadcasting, I am opposed
) this approach. See separate opinions in *Lee Roy Mc-
lourry,* 2 R.R.2d 895 (1964); *George E. Borst el al.,* FCC
5-207 (1965); The Role of Law in Broadcasting, 7 J. of
desting. 113 (1964); Religious Liberty and Broadcasting,
3 Geo. Wash. L.R. (March 1965).

One practical factor that seems to be left out of considera-
on in the adoption of a nonduplication rule is that this is
ie approach which is most likely to provide incentive, if
)t virtual necessity, for CATV's to undertake the origina-
on of their own programs. The operation of the nondu-
lication rule means that the CATV operators are required
) delete material from the programs which they receive
id deliver to subscribers and it also means that when
ich material is deleted the CATV is left with a vacant
iannel. While the economic pressures and motivations
ill undoubtedly vary from situation to situation, this kind
' situation provides both the opportunity and incentive
)r program origination; and therefore, in the long run,
likely to engender more competition for the local tele-
sion stations than it avoids. It seems to me to be far
ore simple and effective, not to mention wise and ap-
ropriate, to require that CATV's shall carry local stations,
iat they shall not alter or degrade the signals that they
irry and that they shall meet such other engineering re-
iirements as may be found appropriate, and to leave de-
rmination of programing to the broadcasters without
)rcing the CATV operators into the area of program selec-
on and encouraging them to enter the area of program
rigination.

The most important and fundamental legal objection t the present Commission action is its lack of adequate juris dictional basis. The rule promulgated by the Commissio at this time undertakes to regulate the programs that ma be carried by CATV's by requiring common carriers tha serve the CATV's to impose upon their customers, as condition of service, the limitations contained in the Com mission rules. The Commission has repeatedly rejected thi basis of jurisdiction in the past, as appears from the case cited and quoted below. But regardless of lack of suppo in precedent or statutory language, the logical implicatio of this approach should warn of its unsoundness. If th Commission can impose its will on a person or busines entity, that is the customer of a common carrier, by th simple device of requiring the common carrier to act a the Commission's policeman in order to keep its licens then the Commission can regulate any business in th United States. Every business and most citizens are cu tomers of the telephone and telegraph companies. It ha never previously been suggested that this fact subjecte them to regulation by the FCC. But if today's decisio stands, then that is the law. The Commission need n longer be constrained by any technical limitations on i jurisdiction arising from statutes enacted by Congress, this theory is sustained by the courts. The rule adopte by the Commission today applies to CATV's served b the telephone company as well as to those served by CAT relay companies. But there is nothing in the logic of th Commission's jurisdictional approach that limits this tec nique to CATV's. If this jurisdictional foundation is sou for CATV's, the Commission may, by precisely the sam technique, impose its regulations on theaters or new papers, on stockbrokers or taxicabs, indeed on any bus ness or person that needs and uses the services of a co munications common carrier.

The Commission's assertion of direct jurisdiction ov companies that receive broadcast signals and transm

iem wholly by wire within a single State, without any)ecific statutory foundation, is equally alarming in its ıplications. The principal argument urged in support of e Commission's jurisdiction over such companies is that is desirable for the FCC to have such jurisdiction in der to attain the broad general objectives of the Comunications Act. However, if this reasoning is sound, then e jurisdiction of the Commission is literally unlimited. here is scarcely any aspect of organized social living that il not in some way related to the complex ramifications of e communications system that is now under the jurisdicon of the Commission. If the Commission has authority deal with any activities which "threaten to impede reızation of the Commission's * * * plan and policies" (memdandum on jurisdiction) then it can control all amusents, the field of journalism, the scheduling of movements trains, planes, and ships, not to mention almost any ıer activity that is either competitive or ancillary to or a important user of communications. Such vague and oad reasoning simply will not sustain jurisdiction as to ativities not plainly within the scope of some more specific atutory language. See *F.P.C.* v. *Panhandle Co.,* 337 U.S. 43 (1949).

When the Communications Act itself is examined it is fınd that not only is language lacking to give the Comıssion jurisdiction which it undertakes to assert here but e language of the statute expressly denies that jurisdicn.

Section 1 of the act, 47 U.S.C. 151, states the purpose o the act in most general terms and states that the FCC is created pursuant to this purpose. However, it does not dfine or confer any jurisdiction.

Section 2 of the act, 47 U.S.C. 152, says in its first subdvision that "the provisions of this chapter shall apply t all interstate and foreign communication by wire or rdio * * *." It does not state that the Commission has

jurisdiction over all such communication. Rather it d
scribes in general terms the scope of the act and the ou
ermost limitations of its application. However, it says th
within these outermost limits the act applies pursuant
its provisions. In other words, in order to find jurisdicti
within the scope described by the first subdivision of se
tion 2, it is necessary to find some specific provision of t
act conferring jurisdiction.

This is emphasized by the second subdivision of se
tion 2, which specifically says that nothing in the act sh
be construed to give the Commission jurisdiction wi
respect to "intrastate communication service by wire o
radio of any carrier" or "any carrier engaged in interst
or foreign communication solely through connection w
radio, * * * with facilities located in an adjoining St
* * * of another carrier * * *." It would seem that the l
ter clauses specifically exclude both CATV relay compan
and CATV's from the jurisdiction of the Commission wh
they do not use microwave. However, it is argued that t
intrastate relay companies using wire, rather than mic
wave, are connected by radio with *broadcasters* in anoth
State rather than with *carriers* in another State. The o
vious answer is that at the time of enactment of the Co
munications Act such things as CATV's were unheard o
and that the intent of Congress expressed in the secon
subdivision of section 2 is to deny the Commission juri
diction over intrastate carriers which are not part of a
single integrated system and which simply carry signa
emanating from another State. The congressional intent
to exclude the Commission from regulation of intrasta
facilities and operations is indicated in a number of pr
visions in the Communications Act. In addition to the r
strictions of 47 U.S.C. 152(2), a statutory denial of Co
mission jurisdiction to regulate intrastate facilities or
operations appears in 47 U.S.C. 214 as to communicati
common carriers, in 47 U.S.C. 221(b) as to telephone co
panies, and even in 47 U.S.C. 301(d) as to radio sig

which do not have a direct effect on interstate communications.

However, it is not necessary to rely upon inferential construction. Examination of the entire Communications Act for a specific provision applicable to companies engaged in transmitting signals intrastate by wire discloses that only section 214, 47 U.S.C. 214, is applicable. This section provides that no carrier shall construct or operate a line without obtaining authority from the Commission provided, however, that no authority from the Commission is required for the construction or operation of "a line within a single State unless such line constitutes part of an interstate line." The section further provides that, "As used in this section the term 'line' means any channel of communication established by the use of appropriate equipment other than a channel of communication established by the interconnection of two or more existing channels * *." Thus, by specific statutory provision, the mere fact that a CATV system or relay company is connected by radio to some other communications facility does not constitute its lines a part of a channel of communication comprising both the out-of-State facility and the intrastate facility. The company which operates by wire within a single State is, therefore, specifically excluded from Commission jurisdiction by section 214. By familiar rules of statutory construction such a specific and explicit exclusion prevails over any inference that might otherwise be spun out of more general language that is claimed to imply jurisdiction.

The Commission memorandum on jurisdiction argues from the definitions of "wire communication" and "radio communication" in 47 U.S.C. 153, to the conclusion that the Commission has jurisdiction over CATV's because their activities may be said to come within the scope of these definitions. This argument is wholly beside the point. The section on definitions confers no jurisdiction at all. Many

terms are defined in that same section, including the ter
"United States," "person" and "State commission." It
obvious that the FCC does not have jurisdiction over t
United States, over State commissions or over all perso
The terms defined have legal significance only to the e
tent that they are used in other sections of the statut
But one will search the act in vain for any section wh
expressly confers jurisdiction upon the Commission in t
broad terms mentioned in the memorandum on jurisdicti
Consequently, the definitions given those terms are n
germane to the issue.

If the argument in the Commission's memorandum s
correct, then the Commission has jurisdiction not only o
intrastate wire relay systems and CATV operating syste
but also over television and radio receivers. The ar
ment made in the Commission memorandum is that a
instrumentality which is incidental to or used in the pr
ess of transmitting picture or sound or which forms a co
necting link in the chain of communication between
transmitting station and the viewing public is subject o
Commission jurisdiction. Television and radio receiv
sets are just as much within this jurisdictional concept s
CATV's and broadcasting stations. In that event the "
channel law" (Public Law 87-529, 47 U.S.C. 303(s)
unnecessary as the Commission had full authority to re
late and license receivers by the terms of the original C
munications Act. Clearly, neither the Commission nor
courts have ever previously thought this to be the c e.
Both have continuously acted on the contrary assumptio

The Commission itself has explicitly denied its righ to
control and its jurisdiction over CATV's in several e
cisions which up to the present time have not been spe f-
ically reconsidered or overruled. The first reported e
cision is *Intermountain Microwave,* 24 FCC 54, ado ed
January 30, 1958. In this case, a television broadca r,
Hill County, objected to the grant of a microwave u

ıority to a CATV relay company. The Commission opinion ıid:

> Hill County is seeking to have the Commission deny a radio authorization to a communications common carrier because the communication circuit to be derived under such authorization will be utilized by subscribers who are competitors of Hill County in endeavoring to provide visual entertainment * * *. We are of the opinion that the request of Hill County must be denied. * * * In considering this problem, it must be remembered that it is possible and feasible for communications common carriers to provide program relay facilities to subscribers where no special authorization is required from this Commission, e.g., where the carrier already has in place properly authorized general cable, wire, or radio facilities which may be put to such particular use in the ordinary course of business. Thus, to single out for special consideration and denial only those situations where new construction is involved, where such new construction is specifically for the purpose of providing a service to the public, when the initial or sole user availing himself of service is a community television distribution system, would be arbitrary, capricious, and discriminatory. An alternative, of course, would be to adopt an overall policy, rule, or condition with respect to every cable, wire, or radio authorization, issued by this Commission to carriers under its jurisdiction, under both title II and III of the Communications Act, prohibiting the rendition of the specific type of service here under attack by the objectors. Such a procedure would be equally arbitrary, capricious, and discriminatory and unwarranted in view of our ultimate determination herein.

A few months later, in *Frontier Broadcasting Co.*, 24 FCC 2[illegible], 16 R.R. 1005 (1958) the Commission specifically

pointed out that even if it held CATV systems to be com
mon carriers they would come within the scope of sectio
214 of the Communications Act and, therefore, would nc
require Commission authority to construct or operate ir
trastate lines. The Commission further said that whe
CATV systems transmitting signals by wire do not em
excessive radiation they involve no radio transmissio
which requires any form of license from the Commissic
under the act.

Thereafter the Commission conducted an extensive in
quiry and after plenary proceedings entered a report an
order considering the whole subject of CATV and r
peater service, 26 FCC 403, 18 R.R. 1573 (1959). The fc
lowing are some of the conclusions then reached and state
by the Commission:

> * * * we find no present basis for asserting juri
> diction or authority over CATV's except as we a
> ready regulate them under part 15 of our rules wi
> respect to their radiation of energy. (Par. 71.)
>
> * * * it would *not* constitute a legally valid exerci
> of regulatory jurisdiction over common carriers
> deny authorization for common carrier microwav
> wire, or cable transmission of television programs
> CATV systems on the ground that such facilities wou
> abet the creation of adverse competitive impact
> the CATV on the construction or successful operati
> of local or nearby stations. (Par. 77.)
>
> Certainly, with respect to anything more than t
> barring of simultaneous duplication, we believe th
> to be an unwarranted invasion of viewers' rights
> get "live" programing if they are willing to pay f
> it. The suggested rules restricting presentation of t
> programs of the local station's network would appe
> to be cumbersome, if not completely unworkable, -
> pecially considering that many stations in small m
> kets, including some of those covered in the reco

present programs of two or even three networks. (Par. 96.)

We have considered herein the problem, the issues raised, and suggested methods of solution. Two of the broadcasters' suggestions, both relating to CATV's, we adopt. These are that CATV systems should be required to obtain the consent of the stations whose signals they transmit and that they should be required to carry the signal of the local station (without degrading it) if the local station so requests. *Since both of these steps require changes in the Communications Act,* we will shortly recommend to Congress appropriate legislation, as indicated above. (Par. 99; emphasis added.)

In 1962 the Commission, with one dissent and one abstention, issued the *Carter Mountain* decision, which is the principal reliance of those who now argue for FCC jurisdiction in this matter. *Carter Mountain Transmission Corp.*, 32 FCC 459 (1962). In this case a CATV relay company applied for authority to transmit television signals by microwave to a small community with one local television station. The television station protested the application and a hearing was held. On the basis of a complete evidentiary record the Commission found that a grant of the microwave authority to the relay company with the bringing of CATV service to the community would result in the demise of the local television station. It, therefore, found that a grant of the microwave authority would not be in the public interest. The Commission stated that the two basic issues in the case were whether the relay company was a bona fide common carrier and whether the economic impact of the grant was of legal significance or the public interest was inherent in the fact that applicant was a common carrier. The Commission held that economic impact of the proposed grant on the broadcasting station was of legal significance and was adequate ground for denying the authority sought. The holding was

explicitly limited to this. The Commission said in its opinion: "There is no attempt to examine, limit, or interfere with the actual material to be transmitted. We are merely considering the question of whether the use of the facility is in the public interest, a conclusion which must be reached prior to the issuance of the grant." The Commission did not consider or discuss the decisions cited above and the only comment in *Carter Mountain* on the earlier decisions is this: "To the extent that this decision departs from our views in the report and order in docket No. 12443, 26 FCC 403 (released April 14, 1959), those views are modified."

The decision was appealed and affirmed by the court of appeals. In the Court of appeals, six issues were agreed upon between the parties and submitted to the court by stipulation. These are set forth in the appellate opinion. *Carter Mountain Transmission Corp* v. *FCC,* 321 F.2d 359 (C.A.D.C. 1963), cert. den. 375 U.S. 951 (1963). None of the issues related either to the imposition of conditions upon or control over the programs to be carried by the applicant or to the possibility of extending FCC jurisdiction to companies not utilizing radio transmission for the carriage of signals. In fact, the Commission in its brief to the Supreme Court in opposition to certiorari, specifically stated that no question of Commission jurisdiction over CATV's operating by wire was involved in that case. The brief stated "* * * several bills have been introduced in Congress to give the Commission direct authority over CATV's, *a question not involved here,* * * *" (FCC brief, p. 10; emphasis added).

A month after issuing its *Carter Mountain* decision, the Commission issued a unanimous order in *WSTV, Inc.* v. *Fortnightly Corp.* 23 R.R. 184 (1962) in which it relied upon and reaffirmed the holding of the *Frontier Broadcasting* decision, and reiterated that "this Commission [is] without title II jurisdiction over the CATV system." Accordingly, the Commission ordered that the complaint by a broadcaster against a CATV system "is dismissed for

failure to state a cause of action within the jurisdiction of the Commission."

In the report and order adopting rules to be imposed on CATV's through the common carriers which serve them, the Commission merely mentions the matter of jurisdiction in a footnote (footnote 5). This cavalier reference relies entirely on the authority of the *Carter Mountain* case as the legal foundation for jurisdiction to issue the rules. But this reliance is wholly misplaced. The *Carter Mountain* decision held only that the Commission could wholly deny a common carrier application when the sole proposed use of the common carrier was to serve a CATV and such service would, on the facts of record in that case, result in the economic destruction of a local broadcasting station. The issue of Commission authority to impose conditions on or control the character of the signals carried by the relay company, not to mention the customer, was not raised or decided in that case, was not considered by the Commission (see par. 3, 32 FCC 460) and, in fact, was expressly disclaimed by the Commission (par. 8, 32 FCC 462). The Commission did say that its denial of the application was without prejudice to the right of applicant to file a new application when conditions had changed so that the operation of the CATV would not have the impact on the local television station which the record there demonstrated was likely to follow in circumstances prevailing at the time of the decision. However, this is a far cry from a holding that the Commission can impose conditions as to the signals to be carried by the communications carrier or by its customer. As noted in the preceding discussion, the Commission told the Supreme Court in the *Carter Mountain* brief that the issue of FCC jurisdiction over CATV's was *not* involved, and shortly after the *Carter Mountain* decision a unanimous Commission reaffirmed that it did *not* have jurisdiction over the carriage of signals by CATV's. There is no reasoned Commission opinion that considers this issue and concludes that the

Commission does have the jurisdiction actually exercised in the instant report and order. Several Commission opinions hold to the contrary. In these circumstances, the casual disposition of the jurisdictional issue in a footnote seems inadequate at best and irresponsible at worst.

The Commission memorandum cites cases like *American Trucking Assn.* v. *U.S.*, 344 U.S. 298, and *NBC* v. *U.S.*, 319 U.S. 190, to sustain jurisdiction. However, the point at issue in those cases, and others like them, was simply whether a regulatory agency having jurisdiction over a field of activity and an enterprise within that field could act with reference to a particular practice not specified in the basic statute. The Supreme Court held that, regardless of the absence of specific reference to a particular practice in the act, the regulatory agency having jurisdiction of the field and the enterprise might promulgate regulations dealing with a practice which was considered to be an evil requiring correction. The Court points out that the necessity of formulating regulations to meet specific practices not foreseen by Congress is precisely one of the reasons regulatory agencies such as the Commission are created. However, this reasoning has nothing whatever to do with an issue as to the existence of jurisdiction over an economic or technical field or a particular enterprise.

A case much closer to the present situation than any cited in the Commission's memorandum is *F.P.C.* v. *Panhandle Co.*, 337 U.S. 498 (1949). In that case the Supreme Court held that the FPC could not extend its power by the kind of reasoning relied on by the FCC here, even though the FPC was seeking to regulate a company concededly within its general jurisdiction but as to an aspect of the company's business that was not within the terms of the statutory jurisdiction. The Court said, inter alia:

> Nothing in the sections indicates that the power given to the Commission over natural-gas companies by

> section 1(b) could have been intended to swallow all the exceptions of the same section and thus extend the power of the Commission to the constitutional limit of congressional authority over commerce.
>
> Failure to use such an important power for so long a time indicates to us that the Commission did not believe the power existed. In the light of that history we should not by an extravagant, even if abstractly possible, mode of interpretation push powers granted over transportation and rates so as to include production * * *. We cannot attribute to Congress the intent to grant such far-reaching powers as implied in the act when that body has endeavored to be precise and explicit in defining the limits to the exercise of Federal power.

The Court stated that if the Commission were of the opinion that it should have the power sought, then it was authorized to call the attention of Congress to that fact. The reasoning adopted by the Court in the *Panhandle* case applies with even greater force to the FCC in the instant situation. Here there is not merely an inference from earlier inaction that the Commission did not believe it had the power now asserted. Here there are clear and explicit declarations by this Commission that it does not have the power which the present majority of the Commission now claims. The only thing that has changed since the Commission last disclaimed the jurisdiction it now asserts is the personnel of the Commission. That is not a proper basis for disregarding precedent and changing established legal principles. See my separate opinion in *Assignment of Additional VHF Channel to Johnstown, Pa., etc.*, 1 R.R. 2d 1572, 1580 (1963).

Contrary to the apparent belief of the Commission majority, the fact that it might be thought desirable for the FCC to have control of CATV's or their practices does not indi-

cate that the agency does possess such power. See *Youngstown Co.* v. *Sawyer,* 343 U.S. 579 (1952). Despite some reservations as to the wisdom and objectivity of the Commission and its staff regarding CATV's, I would agree that, as a matter of principle, the FCC should have the authority to regulate CATV's as a service closely related to broadcasting. I favor and will support appropriate congressional legislation to give the Commission jurisdiction in this field.

This position differs from the assertion of jurisdiction made by the Commission in the instant proceedings in several important respects. First, it is founded on a deferential respect for the constitutional scheme by which Congress must specifically delegate power before it is exercised by an agency created by Congress. Second, the power that Congress delegates is almost certainly going to be specified and limited in extent, whereas the power derived by inference from broad general statutory terms is unlimited except by the self-restraint of the Commissioners and the vigilance of the courts. Finally, it is likely that congressional hearings will illuminate this problem and that Congress will provide some guidance to the Commission that may suggest a better course that the one the Commission is now determined to follow.

At least part of the problem that the Commission now foresees in the proliferations of CATV's is the result of the Commission's own past policies. In the past the Commission has adopted the same restrictive attitude toward translators and other auxiliary services that were within its jurisdiction that it now proposes to take toward CATV's. The popular demand which has been responsible for the recent rapid growth of CATV's has been largely the result of the denial of service to many areas because of the FCC strictness and reluctance in granting authority for the construction and operation of translators and boosters. Apparently the Commission has not yet learned that the expansion of service is not to be attained by the limitation of compet

tion and the imposition of rigorous regulation but rather by stimulating competition and moderating regulation. The Commission can do many things to stimulate and encourage the extension and expansion of television service throughout the country, but regulating the programs that can be brought into homes by CATV's and extending the Commission's jurisdiction without specific congressional authority are not likely to help.

However, it seems to me that the most basic and important issue involved here is far more important than the interests of the broadcasters, the CATV's, or even of the audience in securing broadcasting service. The basic issue involved here is whether a great Government agency will show reasonable respect for its own precedents and reasonable restraint in seeking to extend the scope of its own power. Undoubtedly the independent regulatory agencies have been given great power and broad discretion in its exercise. But if democratic government is to survive, the corollary of great power and broad discretion must be a strong impulse of self-restraint in the exercise of such power. In the face of statutory language, the Commission's own precedents, the prior statements of the Commission to the courts and its requests to Congress for legislation on this subject, it seems to me to be presumptuous for the Commission now to assert jurisdiction which it has previously explicitly disclaimed. If the laws are inadequate to cope with the problems of the moment, it is the function of Congress to remedy that lack. There is no reason to assume that Congress is any less responsive than the Commission to the public interest, or that it is unable or unwilling to act if action is needed in this field at this time. I am, accordingly compelled to dissent from the Commission's efforts to extend its jurisdiction without specific congressional authority.

APPENDIX C

Legslative History of Proposed Amendments to the Communications Act, Conferring Jurisdiction over CATV

I

On September 8, 1959, and after lengthy hearings during the 86th Congress, First Session, the Committee on Inter state and Foreign Commerce submitted Senate Report 92 accompanying and recommending passage of Senate Bil 2653, entitled "A bill to amend the Communications Ac of 1934 to establish jurisdiction in the Federal Communi cations Commission over Community Antenna Systems."

The bill provided as follows:

> That section 3 of the Communications Act of 193 (47 U.S.C. 153) is amended by inserting at the en thereof the following: "(hh) 'Community antenna tel vision system' means any facility performing the serv ice of receiving and amplifying the signals transmit ting programs broadcast by one or more television sta tions and redistributing such programs, by wire, t subscribing members of the public, but such term sha not include (1) any such facility which serves fewe than fifty subscribers, (2) any such facility whic serves only the residents of one or more apartmer dwellings under common ownership, control, or mar agement, and commercial establishments located o the premises, or (3) any such facility used only f the distribution, by wire, of programs for which charge is imposed generally on all subscribers wher ever located and which are not in the first instan broadcast for reception without charge by all membe of the public within the direct range of televisio broadcast stations."
>
> Sec. 2. Section 3 (h) of the Communications Act 1934 (47 U.S.C. 153) is amended to read as follows:
>
> "(h) 'Common carrier' or 'carrier' means any pers engaged as a common carrier for hire, in intersta

or foreign communication by wire or radio or in interstate or foreign radio transmission of energy, except where reference is made to common carriers not subject to this Act; but a person engaged in radio broadcasting or in operating a community antenna television system shall not, insofar as such person is so engaged, be deemed a common carrier."

Sec. 3. Title III of the Communications Act of 1934 (47 U.S.C. 301 and the following) is amended by inserting therein a new section 330 as follows, entitled:

"Community Antenna Television Systems

"Sec. 330. (a) No person shall operate a community antenna television system except under and in accordance with this Act and with a license granted under the provisions of this Act: *Provided,* That a community antenna television system which is in operation on the date of the enactment of this section may continue to operate until the Commission issues a license therefor: *Provided further,* That any system continuing to operate in accordance with the foregoing shall, not later than one hundred and twenty days after such enactment, submit an application for a license containing all the information required by the Commission to be submitted with such application.

"(b) (1) The provisions of sections 303, 304, 307, 308, 310, 311, 312, 313, 315 and 316 relating to stations, radio stations, broadcasting stations, licenses therefor, licensees thereof, and station operators shall apply also to community antenna television systems, licenses therefore, licensees thereof, and operators thereof.

"(b) (2) The provisions of section 317 relating to matters broadcast by any radio station, and section 326 relating to radio communications shall be deemed to apply also to all matter distributed to its subscribers by a community antenna television system.

solely in rebroadcasting) which is assigned to a c
munity in which a community antenna television s
tem provides television programs to local subscrib
the Commission may require that such commu
antenna service shall regularly redistribute progra
broadcast by such local television broadcast statio

"(f) (2) The Commission may, by rule or order, p
scribe such standards and conditions as it may
necessary to assure that the reception of the progra
redistributed by the community antenna television s
tem under subsection (1) shall be reasonably com
able in technical quality to the reception of program
other television stations redistributed by the com
nity antenna television system.

"(f) (3) The Commission also may, by rule or or
prescribe the period of time within which commu
antenna television systems shall complete preparat
for and commence the redistribution of programs u
subsections (1) and (2).

"(g) The Commission shall prescribe appropr
rules and regulations in order to avoid the duplica
of programs broadcast or scheduled to be broadcas
a television station (other than a station engaged s
in rebroadcasting) which is assigned to a communit
which a community antenna television system se
subscribers by such community antenna television s
tem redistributing the signals of another television
tion. In promulgating such rules and regulations
Commission shall be guided by the standard set f
in subsection (c) of this section, requiring that
regard be given for the desirability of facilitating
continued operation of a television station which is
viding the only available locally originating televi
broadcast program service."

The committee report explained the purpose of the bill as to place CATV under the jurisdiction of the FCC:

> This bill is designed to amend the Communications Act of 1934 so as to place community antenna television systems (CATV) under the jurisdiction of the Federal Communications Commission and to empower the Commission to issue requisite certificates of public interest, convenience, and necessity for the construction and operation of community antenna television systems. This bill declares CATV systems not to be common carriers and sets forth the sections of title III of the Communication Act affecting regular broadcasters that are to apply to the community antenna television systems.

SRep. No. 923, 86th Cong., 1st Sess. 3 (1959).

The report summarized the Commission's treatment of CATV since its inception and referred to it disclaimer of jurisdiction in *Frontier Broadcasting Co.* v. *Laramie Community TV Co.*, 16 P & F Radio Reg. 1005 (1958):

> The question of the FCC's jurisdiction over community antenna television systems and the type of regulation that should be imposed was raised many years ago. The FCC's files make it clear that this issue was presented to it as early as 1950 and that its staff recommended that it exert authority in this field. But, the Commission has long hesitated over the matter. In speeches by individual commissioners and in testimony before your committee, doubt as to its power has been expressed but no official ruling was made until April 21, 1958, when the FCC decided a long-pending proceeding instituted by a group of small-town broadcasters who asked that the Commission regulate CATV systems as common carriers. (*See Frontier Broadcasting Company* v. *Collier*, 16 R.R. 1005 (April 1958.)) The

> Commission's final action in this matter made it per fectly clear that it did not intend to regulate CAT systems in any way whatsoever. However, on May 2 1958, the FCC instituted an inquiry into the impac of community antenna television systems, televisio translators, television satellite stations, and televisio reflectors upon the orderly development of televisio broadcasting (Docket No. 12443) and included as pa of that proceeding the reconsideration of the abov mentioned *Frontier Broadcasting* case. *Id.* at 5.

After several amendments to the bill were offere S. 2653 was debated on the Senate floor on May 17 ar 18, 1960. Senator Pastore, chairman of the sponsorir committee, was the floor leader and explained that the b was not designed to hurt CATV, but merely place it und regulatory control:

> This bill is not directed in any way toward injurir CATV as such. We seek merely to place CATV sy tems under regulation in order to protect their right and also to protect the rights of the only availab broadcasting station, which may perish and go out existence unless proper reforms are taken now of very moderate nature. 106 Cong. Rec. 10417 (196

Senator Pastore was questioned at length on the purpos of the bill and explained it was a new delegation of authc ity of jurisdiction over CATV. In a brief colloquy, it w stated:

> Mr. Curtis. First, I thank the distinguished Senat for his long efforts in a difficult area. I have giv very limited study to S. 2653. It appears to me th the proposed legislation places the community anten systems under the jurisdiction of the Federal Co munications Commission. To that extent there is delegation of authority to them. Does the bill direc

prohibit or outlaw any act that the community antenna systems are doing now?

Mr. Pastore. I do not think so, aside from the fact that now they are at liberty to take a picture from a broadcasting station in Phoenix and show it in Yuma, for example. It may be earlier than the picture would be shown on the local broadcasting station in Yuma, and if the broadcasting station at Yuma made an application to the FCC, it could bring that to a stop. That would be a deprivation of some activity. That is about as far as it would go.

Mr. Curtis. The bill grants to the Commission the right to look into that situation?

Mr. Pastore. And to make rules and regulations.

Mr. Curtis. To make rules and regulations.

But in the absence of action by the Commission, is there anything in the bill which prohibits what the community antenna systems can do?

Mr. Pastore. I would not say so, unless the Senator sees something in the bill to the contrary. *Id.* at 10425.

n answer to questions by Senator Kerr, an opponent of th bill and of the grant of jurisdiction to the FCC over CATV, Senator Pastore explained that the jurisdictional grnt was necessary to develop an orderly system of TV:

. . . [I]t is necessary to put these people under regulation, so that as new licenses are granted the Federal Communications Commission will have jurisdiction. The FCC then will be in a position to develop an orderly system of TV. However—and this must be borne in mind—insofar as harassment is concerned, or so far as a burden may be incurred, because of the

> duties that are imposed upon a CATV organizatio where there is no problem, I would assume the actio of the Federal Communications Commission would b nothing more than perfunctory. *Id.* at 10426.

The Kerr-Pastore debate demonstrated that the issu before the Senate was whether the FCC was to gain ju isdiction over CATV through the passage of the amen ment—jurisdiction which it admittedly lacked:

> Mr. Kerr. Did it ever occur to the Senator fro Rhode Island that there are hundreds and thousan of American Businesses in operation who are prayin unto the Lord and their Government to protect the by keeping them free of regulation, rather then in posing it on them and then having them depend upon legislative record made on the floor of the Senate whic if someone downtown whose identity we do not kno is controlled by it ,will let them loose after they ha paid a bunch of lawyers in Washington to come dow to get them loose?
>
> The Senator says he cannot write a bill to prote these people. Apparently the Senator does not know h own ability. . . .
>
> . . . .
>
> Mr. Pastore. There was not one representative of CATV who appeared before our committee who did n say that he wanted to be regulated. I call as my chi witness the Senator from Oklahoma [Mr. Monroney who is going to make the motion to recommit the bi As a matter of fact, Senator Monroney introduced bill himself to regulate the entire industry. Howev that bill is only a shell. It does put them under regu tion, but it does not regulate.
>
> Mr. Kerr. Next to not being under it, that is the b shape one can be in. *Ibid.*

Senator Pastore urged that by conferring jurisdiction over CATV, the bill would actually provide protection to CATV systems against exorbitant charges by the broadcast station, should the stations prevail in pending copyright litigation. Senator Kerr countered that the FCC through its present jurisdiction over the broadcasters could protect CATV without extending its jurisdiction to CATV.

Mr. Kerr. Did the Senator from Rhode Island say the Federal Communications Commission, which has control of the station whose signal is being picked up, could not control them without this act?

Mr. Pastore. I did not say that.

Mr. Kerr. That is what the Senator did say.

Mr. Pastore. I said the CATV would not have any right to go before the FCC.

Mr. Kerr. Who says they would not?

Mr. Pastore. I say so.

Mr. Kerr. Who prescribes that?

Mr. Pastore. Because the Senator says they should be put under the CATV. That is just the point.

Mr. Kerr. Cannot a person go into court and ask for justice, without being set aside by the court?

Mr. Pastore. The FCC is not a court. It is a regulatory body. We are trying to put the parties under this body with appropriate procedures.

Mr. Kerr. The Senator wants to make them slaves, without provision for protection of their lives. How silly can one get?

Mr. Pastore. I am not silly. I am talking about jurisdiction.

Mr. Kerr. So am I.

Mr. Pastore. I am talking about jurisdiction, and there is nothing silly in it.

Mr. Kerr. The Federal Communications Commission does not have to be given regulatory control over any citizens to enable those citizens to go before that Federal Communications Commission and file a petition.

> Mr. Pastore. A petition to do what?
>
> Mr. Kerr. To enforce any right that an American citizen has with reference to that Commission's jurisdiction.
>
> Mr. Pastore. The Senator could not be more wrong than he is. *Id.* at 10429-30.

Senator Pastore, the floor manager, insisted that the bill was necessary to confer CATV jurisdiction upon the FCC, and that without it, the Commission was powerless to act.

Regarding the effects of the bill in conferring jurisdiction, Senator Monroney emphasized that it would provide unprecedented economic protection to broadcasters:

> The only test for the granting of a license for a television or a radio station, in the long history of the Federal Communications Act, has been, Is there a frequency available which will not interfere with the frequency assigned to someone else? A hundred television stations could be established if frequencies were available for them. If there is a radio station in Yuma, six stations could be put in if frequencies could be found for them. But we have never contemplated granting economic protection to licensees until this bill was introduced. We are breaking entirely new ground, which will extend in the future to such a point that other people will want to install television in an area, and it will be necessary to provide economic protection for the local single station. I do not think such a policy has ever been established. *Id.* at 10535.

Senator Monroney compared the immunity from FCC regulation of reception and cable distribution by CATV to that enjoyed by the television networks:

> Mr. Long of Louisiana. Does the bill violate the principle that the airways are free and are available to everyone?

Mr. Monroney. I do not think it does. But it violates the principle of not having Federal regulation of cable transmission.

Let me state the best illustration: All of us know that the mightiest force in television, which controls 90 percent of all television programs received by viewers in the United States, are the networks. They are not subject to regulation, and very few Members of Congress would want them to be regulated. Why? Because the concept of the Federal Communications Act is that the networks themselves are not putting anything on the air. They use cables to carry the signals to the local stations. So they are not regulated. So we do not regulate—and I do not think we should—the mighty giant of television which supplies the television diet of 50 million television sets by carrying the television program signals by cable to the viewers.

But if the quite similar CATV systems are to be regulated by means of this bill, we shall be establishing a precedent; and in that event I do not see how we can properly regulate the smallest midget in the industry, but fail to give some consideration to regulating the mighty networks which are carrying signals by means of a similar system, and also without using the airways. *Id.* at 10536.

Senators opposing the amendment recognized that the bill was designed to provide economic protection for television.

Mr. McClellan. The meaning of the word "facilitate," as I understand it, is to make easy or less difficult; to free from difficulty or impediment. In other words, it is to facilitate the execution of a task; to lessen the labor of; to assist; aid. In other words, the station owner could petition the Federal Communication Commission to impose conditions that will facilitate, that

will aid, that will remove any difficulty, that will remove encumbrance or hindrance to the continued operation of that station.

Mr. Monroney. Which would mean limiting competition, which this bill is designed to do, from newly constructed CATV's.

. . . .

Mr. McClellan. In other words, the rules the Commission promulgates must be promulgated to achieve that purpose. That is the proposed law we are considering. I am not saying it is not a good thing, but I think we ought to know what it does. This provision sets up a TV station in a position of preferred consideration, and in a position of preferred considereation in competition with another station. *Id.* at 10537.

Senator Long registered concern over the economic advantage to broadcasters conferred by the bill.

Mr. Long of Louisiana. I am referring to page 4 of the bill, at line 21, where it provides:

A television station * * * may petition the Commission to include in such license such conditions on the community antenna television system's operation as will significantly facilitate the continued operation of a television station which is providing the only available locally originated television broadcast program service.

The thought that occurs to me is that it would seem to go far enough to say that the community antenna system should not impose any undue injury or hardship on the television station. However, to say that it could be required to operate in a manner to facilitate

the continued operation of the competitor and system in his business, is too much to ask.

. . . .

Mr. Long of Louisiana. As the law stands today there is nothing in the law by which the FCC can prevent one television station from driving another one out of business. I have seen that happen in my state, where a VHF station came into the community which had a UHF station, by providing a better signal and better programs. *Id.* at 10541.

Senator Hickenlooper questioned whether the proposed amendment conferring jurisdiction upon the FCC was constitutional.

Mr. Hickenlooper. Mr. President, I merely wish to ask some questions of the Senator from Oklahoma or of another Member of the Senate.

It seems to me that a rather complicated legal situation could arise in this instance. As I understand, a CATV station merely takes something out of the air, and does not put anything into the air.

Mr. Monroney. That is correct.

Mr. Hickenlooper. After it takes something out of the air—just like using the air we breathe—it then wires it, by means of a physical operation, into a house, where it is hooked up to a television set.

Mr. Monroney. That is correct.

Mr. Hickenlooper. What justification is there for having the Federal Government move into that regulatory field? Can it be called interstate commerce? If so, can the Federal Government then regulate my radio set in my house because I take the signal out of the air by means of an aerial erected on top of my house?

> Mr. Monroney. This presents a problem, because many think this is exclusively in the field of interstate commerce. Of course, the ether waves are interstate. But when the signal is taken out of the air and is transmitted to the Senator's house by cable, that is purely intrastate. *Id.* at 10543.

The issue to recommit the bill was plainly and openly acknowledged as an attempt to defeat it.

> Mr. Kerr. Mr. President, I rise in support of the motion to recommit the bill. I do it for the simple reason that I think it is an absolute necessity to protect the well-being and the opportunity for existence of over 760 small businesses. . . . *Id.* at 10544.

The bill was recommitted by a vote of 39 to 38. *Id.* at 10547. A vote to reconsider failed 38 to 36. As a post mortem to the defeat of S. 2653, Senator Moss, a proponent of the bill, asked for further study by Congress as to whether, in view of the bill's failure to pass, appropriate legislation should be enacted to grant the FCC some jurisdiction over CATV in order to protect local television. *Id.* at 11462.

Throughout the lengthy debate, both proponents and opponents assumed that the legislation was necessary in order to confer jurisdiction upon the FCC over CATV. The legislation failed to pass.

II

In the 89th Congress, S. 3017 was introduced on March 4, 1966, 112 Cong. Rec. 4901 (1966). It was entitled "a bill to amend the Communications Act of 1934 to authorize the Federal Communications Commission to issue rules and regulations with respect to community antenna systems, and for other purposes." The bill provided no regulation

scheme or rules as did S. 2653, 86th Cong., 1st Sess., but merely conferred jurisdiction over CATV upon the FCC. It also barred program origination by CATV, and relegated it to the role of receiving and distributing broadcast signals. This bill was submitted subsequent to the FCC's assumption of jurisdiction and was designed, in the words of its chairman as a confirmation of jurisdiction.

> The Commission has determined that it has jurisdiction over all CATV systems, and it has asserted that jurisdiction to the extent necessary to carry out the announced regulatory program. However, given the importance of CATV, we believe it highly desirable that Congress amend the Communications Act to confirm that jurisdiction and to establish such basic national policy as it deems appropriate.
>
> ....
>
> Of prime importance is the proposed new section 331(a)(1) of the act, which would expressly confer upon the Commission, in broad and comprehensive terms, authority to regulate community antenna systems in the public interest. This authority is to be exercised only to the extent necessary to carry out the purposes of the Communications Act, particularly the establishment and maintenance of broadcast services and the provision of multiple reception services. There is thus a congressional recognition of the public service rendered by the broadcast and CATV industries and a directive to promote the orderly growth of both industries. *Ibid.*

Also, submitted along with the explanatory statement is the dissenting statement of Commissioner Loevinger who adhered to the previous FCC rulings that it had no jurisdiction.

Separate Statement of Commissioner Lee Loevinger Regarding Proposed CATV Legislation

I believe it is necessary for Congress to legislate on the subject of community antenna television and that the draft of proposed legislation submitted herewith by the FCC is the best compromise that can now be agreed upon. It is my opinion that under present statutes the Commission does not have the jurisdiction which it claims over CATV's. See my separate opinion at 4 RR 2d 1679, 1712. If the Commission is to act in this field, legislative authorization is, therefore, necessary.

. . . .

It would be desirable for Congress to establish more specific standards for administrative action than are contained in the proposed bill. But it is appropriate for Congress to delegate broad authority for the Commission to act under whatever standards Congress may see fit to establish.

Accordingly I join in recommending that Congress consider the proposed bill submitted herewith and enact legislation in such form as may best express the congressional view of the proper way to deal with the problems involving FCC jurisdiction to regulate CATV systems, the operation of CATV systems, the relation of CATV systems to conventional broadcasting stations, and the relation between Federal and State jurisdiction in this field. *Id.* at 4902.

The bill, S. 3017, contains the following language:

That section 3 of the Communications Act of 193 (47 U.S.C. 153) is amended by adding at the end ther of a new subsection to read as follows:

"(gg) 'Community antenna system' means any fac ity which, in whole or in part, receives directly or i

directly over the air and amplifies or otherwise modifies the signals transmitting programs broadcast by one or more broadcast stations and distributes such signals by wire or cable to subscribing members of the public who pay for such service."

Sec. 2. The Communications Act of 1934 is further amended by adding a new section to read as follows, entitled:

"Community Antenna Systems

"Sec. 331. (a) The Commission shall, as the public interest, convenience or necessity requires, have authority:

"(1) to issue orders, make rules and regulations and prescribe such conditions or restrictions with respect to the construction, technical characteristics, and operation of community antenna systems, to the extent necessary to carry out the purposes of this Act, with due regard to both the establishment and maintenance of broadcast service and the provision of multiple reception services;

"(2) to make general rules exempting from regulation, in whole or in part, community antenna systems where it is determined that such regulation is unnecessary because of the size or nature of the systems so exempted.

"(b) No community antenna system shall transmit over its system any program or other material other than that which it has received directly or indirectly over the air from a broadcast station, except that the Commission may, upon an express finding that it would serve the public interest, authorize by general rule limited exceptions to permit such transmissions without any additional charge to subscribers.

"(c) Nothing in this Act or any regulation promulgated hereunder shall preclude or supersede legislation

relating to, or regulation of, community antenna systems by or under the authority of any State or Territory, the District of Columbia, the Commonwealth of Puerto Rico or any possession of the United States except to the extent of direct conflict with the provisions of this Act or regulations promulgated hereunder."

III

Again in the 89th Congress a bill was introduced conferring jurisdiction over CATV. H.R. 13286, 89th Cong., 2d Sess. (1966). On June 17, 1966 the House Committee on Interstate and Foreign Commerce issued H.R. Rep. No. 1635, accompanying H.R. 13286, entitled "a bill to amend the Communications Act of 1934 to authorize the Federal Communications Commission to issue rules and regulations with respect to community antenna systems, and for other purposes." The bill, as amended, provides:

That (a) section 3 of the Communications Act of 1934 (47 U.S.C. 153) is amended by adding at the end thereof the following new subsection:

"(gg) 'Community antenna system' means any facility which, in whole or in part, receives directly or indirectly over the air and amplifies or otherwise modifies the signals transmitting programs broadcast by one or more broadcast stations and distributes such signals by wire or cable to subscribing members of the public who pay for such service."

(b) Subsection (h) of such section 3 is amended to read as follows:

"(h) 'Common carrier' or 'carrier' means any person engaged as a common carrier for hire, in interstate or foreign communications by wire or radio or in interstate or foreign transmission of energy, except where reference is made to common carriers not subject to this Act; but a person engaged in radio broadcasting

or in operating a community antenna system shall not, insofar as the person is so engaged, be deemed a common carrier."

Sec. 2 Part I of title III of the Communications Act of 1934 is amended by adding at the end thereof the following new section:

"Community Antenna Systems

"Sec. 331.(a) The Commission shall, as the public interest, convenience or necessity requires, have authority—

"(1) to issue orders, make rules and regulations, and prescribe such conditions or restrictions with respect to the construction, technical characteristics and operation of community antenna systems, to the extent necessary to carry out the purposes of this Act, with due regard to both the establishment and maintenance of broadcast services and the provisions of multiple reception services; and

"(2) to make general rules exempting from regulation, in whole or in part, community antenna systems where it is determined that such regulation is unnecessary because of the size or nature of the systems so exempted.

The Commission shall, in determining the application of any rule or regulation concerning the carriage of local broadcast stations by community antenna systems, give due regard to the avoidance of substantial disruption of the services to subscribers of community antenna systems which were in operation on March 1, 1966, resulting from the limited channel capacity of any such systems.

"(b) No community antenna system shall transmit over its system any program or other material other than that which it has received directly or indirectly

over the air from a broadcast station, except that t
Commission may, upon an express finding that it wo
serve the public interest, authorize by general r
limited exceptions to permit such transmissions wi
out any additional charge to subscribers.

"(c) The Commission shall prescribe such rules a
regulations and issue such orders as may be necess
to require the deletion by community antenna syste
of signals carrying any professional football, baseb
basketball, or hockey contests if, after application
the appropriate league, the Commission finds that
failure to delete such signals would be contrary to
purposes for which the antitrust laws are made
applicable to certain agreements under Public I
87-331.

"(d) Nothing in this Act or any regulation pro
gated under it shall preclude or supersede legisla
relating to, or regulation of, community antenna s
tems by or under the authority of any State, the D
trict of Columbia, the Commonwealth of Puerto R
or any possession of the United States except to
extent of direct conflict with the provisions of this
or regulations promulgated under it." H.R. Rep.
1635, 89th Cong., 2d Sess. 1-2 (1966).

In the purposes of the legislation, the Committee
cautious not to challenge the FCC's already assumed j
diction.

The principal purposes of the legislation are to—

(1) delineate the scope of the authority of the F
eral Communications Commission to regulate C
systems. . . . *Id.* at 2.

The Committee pointed out that although the F
eral Communications Commission had asserted its juris

on over CATV, the Committee would not state a position, xcept to say that the Congress should confer this jurisdic- on.

> In reporting the instant legislation, the committee does not either agree or disagree with the above conclusions. Test cases are pending at present in the courts. Therefore, the question of whether or not and to what extent the Commission has authority under present law to regulate CATV systems is for the courts to decide in such cases.
>
> It is the considered judgment of the committee, however, that in order properly to regulate broadcasting and communications in the United States the Commission should have the broad powers which the instant legislation would confer upon the Commission to regulate CATV systems. *Id.* at 9.

The Commission, in its explanatory note attached to the Committee report, candidly admitted it wished the Congress t confirm jurisdiction which it had assumed.

> The Commission has determined that it has jurisdiction over all CATV systems, and it has asserted that jurisdiction to the extent necessary to carry out the announced regulatory program. However, given the importance of CATV, we believe it highly desirable that Congress amend the Communications Act to confirm that jurisdiction and to establish such basic national policy as it deems appropriate. *Id.* at 16.

Commissioner Loevinger issued a separate statent explaining that although he favored the proposed legislation, he believed it necessary to confer jurisdiction upon the FCC.

> I believe it is necessary for Congress to legislate on the subject of Community Antenna Television and that

> the draft of proposed legislation submitted herewith by the FCC is the best compromise that can now be agreed upon. It is my opinion that under the present statutes the Commission does not have the jurisdiction which it claims over CATV's. See my separate opinion at 4 RR 2d 1679, 1712. If the Commission is to act in this field legislative authorization is, therefore, necessary. *Id.* at 20.

The Department of Justice, in response to a request for its views, was careful not to state an opinion as to whether the FCC had jurisdiction over CATV.

> The principal purpose of the bill is to clarify and confirm the Commission's jurisdiction over community antenna systems in order that the Commission shall have clear authority to integrate community antenna service into the national broadcast structure in such a way as to promote maximum service to everyone, including both those persons who are dependent upon off-the-air service and those who may receive cable service. *Id.* at 21.

The minority report of the Committee did not hesitate to state its position that the Commission lacked jurisdiction over CATV and that the Commission had unlawfully usurped this jurisdiction.

> H.R. 13286 is a bill that was prepared by the Federal Communications Commission and forwarded to the Congress with the request that it be passed. It is not an administration bill. It is an attempt by a Federal agency to force Congress to give it jurisdiction which it heretofore claimed it did not have. The passage of this bill at this time would serve to underwrite an unauthorized assumption of jurisdiction by the Federal Communications Commission; it would

thwart the judicial processes which are presently considering the issues involved; it would create an entire new concept of regulation at the Federal level; it would violate the constitutional guarantees of the first amendment; it would permit a Federal administrative agency (supposedly an arm of the Congress, created by the Congress) to write substantive law by the exercise of rulemaking powers; it would authorize a Federal agency, not answerable to the electorate, to repeal the laws of the several States by rulemaking powers; it would authorize monopolistic practices in the broadcasting of professional sports events and deny millions of people the opportunity of witnessing these events by television; it would create the power of censorship in the Federal Communications Commission insofar as CATV systems are concerned; it would give the Federal Communications Commission the authority in certain areas to determine what a person could or could not receive over his television or radio set—to name a few of the flaws.

Television and radio were not intended to be regulated in the same manner as public utilities. They were subjected to regulation only because of the limited frequencies available in the spectrum. Regulation was for the sole purpose of properly policing the spectrum and seeing that it was not abused. Hence, licenses for broadcasting radio signals were required, because the spectrum was public domain and subject to the police powers of the sovereign.

The history of the Communications Act of 1927 and the amendments thereto of 1934 reflect clearly that the purpose of regulation was to make it possible for the full spectrum to be used in an orderly manner so that broadcast signals would not conflict with each other and thereby create a pandemonium of static which would be of no use to anyone. The operation of the businesses operating under licenses issued by

the Government was to be on the free enterprise base. In other words, it was spelled out in the history that the Government would not have jurisdiction of the economics of the several broadcasters. Whether or not they were able to stay in business or to be successful in their operations was to be determined solely by the traditional free enterprise system upon which this country was built. Many attempts have been made by the Federal Communications Commission to gain economic control over the broadcasters. The most recent attempt was in 1963 when the Commission issued orders limiting the length and frequency of broadcast commercials. The House of Representatives struck down this attempt by the passage of a bill denying them the power to enter the field of economic control.

H.R. 13286 as proposed by the Federal Communications Commission is an attempt to gain economic control over CATV systems and thence to move forward to gain economic control over broadcasters and thereby measurably expand the regulatory powers of the Communications Commission on a Federal basis.

A CATV system is a wired communications system and does not use the spectrum or public domain for broadcasting purposes. Hence, the Commission has heretofore held on several occasions that it did not have jurisdiction of CATV systems as such.

There are three methods by which programs can be received by a CATV system to be transmitted over it wires:

1. The pure off-the-air system. This is the case where a high antenna is employed to catch any broadcast signals that happen to come its way.

2. The microwave-fed system. This is the system where the original broadcast is rebroadcast through the spectrum, one or several times, until it reaches its desired destination. (The FCC has jurisdiction over the microwave facility because it is a rebroad-

cast into the spectrum, but not over the reception facility.)

3. The coaxial cable. This is a system where a coaxial cable is employed from the broadcasting station to the CATV system. If the coaxial cable does not cross a State line, the Federal Communications Commission does not have jurisdiction. If the coaxial cable does cross a State line, the jurisdiction of the FCC attaches under its jurisdiction over an interstate common carrier by wire. However, in this case the jurisdiction of the Commission does not extend to a determination of what can or cannot be carried over the wire.

The present bill is designed to give the Federal Communications Commission absolute control over reception by all three methods. The main objective of the Federal Communications Commission is to gain control over the off-the-air (subpar. 1 above) and the coaxial cable (subpar. 3 above), for by this method the Commission can gain direct control over reception of television signals insofar as all CATV systems are concerned. It has had an indirect, limited power over CATV systems using microwave. The operator of a microwave facility must get a license from the Federal Communications Commission because he is transmitting radio signals. The Commission has taken the position that it can issue a license with restrictions and conditions as to what the microwave operator can transmit, even though section 326 of the Communications Act prohibits censorship.

If the Congress passes H.R. 13286 it will open the door wide for the Federal Communications Commission to gain jurisdiction over the reception of television and radio signals—jurisdiction positively denied the Federal Communications Commission under the Communications Act as amended in 1934. It will enable the Commission to determine what can be received by the viewers of this Nation from satellite trans-

mittals, as well as local broadcasting stations and network broadcasts. Freedom requires that full freedom of communications and information be preserved and protected. The passage of H.R. 13286 would do irreparable damage to this freedom. The people in the fringe areas of radio and television reception would be at the mercy of the Federal Communications Commission and its rulemaking powers.

. . . .

It is to be noted that the Federal Communications Commission, although previously denying jurisdiction in the field of CATV, in the early months of 1966 completely reversed their position and assumed jurisdiction over all CATV operations. Lawsuits were filed and are now pending. The Federal Communications Commission, no doubt fearing that it had flagrantly overstepped its jurisdiction, came to the Congress to put its stamp of approval on such action. It is asking the Congress at the present time to give it unbridled authority to control every aspect of the CATV business, a power it has never had over the broadcasting business, but which it wants badly—an entirely new concept in governmental regulation.

The Congress of the United States should not abdicate its legislative powers and delegate to a commission the power to write substantive law by rules and regulations promulgated by an appointed body.

If the Federal Government is to enter a new field of regulation, the manner and extent to which this will be undertaken should be definitely and explicitly spelled out by the duly elected representatives of the people of this country in the Congress of the United States and not by a board, a bureau, or a commission wholly and completely insulated from the electorate. *Id.* at 23-25.

The minority views, in respect to the powers of the Commission and its lack of jurisdiction over CATV, were not

disputed by the majority, which merely urged passage of the legislation. A second minority report also strenuously objected to the jurisdictional grab by the FCC.

Community antenna television systems have been around since 1950, and until 1965 the Federal Communications Commission very clearly indicated that it did not pretend to have jurisdiction over the transmission of broadcast signals by cable. In fact it specifically denied having such jurisdiction. Suddenly, however, the Commission did a complete turnabout and argued that it had always possessed authority to regulate cable television as an extension of broadcasting and its recognized interstate character. By a 5 to 2 decision the Commission determined that the Communications Act of 1934 meant something else and something more than it clearly is. When we consider the fact that the makeup of this Federal agency changes rapidly, such action can lead to dangerous consequences.

Apparently uncertain of its ground, the Commission prepared and suggested a most peculair piece of legislation which is H.R. 13286. Even a casual reading of this bill will indicate that it makes no attempt to determine a broad policy under which the CATV industry should develop in conjunction with the broadcasting industry. Instead it merely grants broad authority, throwing the whole problem to the Federal Communications Commission and hoping for the best.

Most of the 30 amendments which were offered by members of the committee during the deliberations on this bill were intended to show the will of Congress and to provide reasonably clear guidelines. They were offered in an attempt to make this bill at least reasonably consistent with past principles for the regulation of industry. They were defeated.

The result of passing H.R. 13286 would be to create havoc within an industry of great importance to the public because the policies adopted by the Commission for its regulation today could well be reversed or radically changed a month or a year hence. There are no general principles to which the industry can point or by which the Congress may oversee the activities of its creature, the Federal Communications Commission.

In the case of broadcasting facilities the Federal Communications Commission must allocate a frequency and issue a license therefor. In the case of community antenna systems there is no provision for licensing, but the bill does grant authority to issue permits for construction. This of course means that construction authority can be denied to any applicant. Under the terms of this bill construction permits would be within the complete discretion of the Commission. In our opinion this grants to the Federal Communications Commission a completely unacceptable and probably unconstitutional power over this industry.

. . . .

There are presently pending lawsuits which will determine whether or not the Federal Communications Commission was right when it first denied having jurisdiction over CATV or whether it was right later when it reversed itself. Also pending are lawsuits to determine the applicability of the copyright laws to material carried by CATV systems. The determination of these matters requires no legislation and little purpose is served in passing such legislation at this time, particularly since it does not purport to lay down realistic policies and guidelines within which regulation of the CATV industry can logically proceed. *Id.* at 26-27.

The bill failed to reach the floor for vote.

APPENDIX D

Legislative History of Section 4(i) of the Communications Act of 1934

Section 4(i) first appeared in H. R. 8301, 73d Cong., 2d Sess. (1934), was carried into S. 2910, and S. 3285, 73d Cong., 2d Sess. (1934), without change, and was finally enacted as section 4(i) of the Communications Act of 1934, 48 Stat. 1066, 47 U.S.C. § 154(i) (1960).

In the Senate Interstate Commerce Committee report on S. 3285, S. Rep. No. 781, 73d Cong., 2d Sess. (1934), there is no specific discussion of section 4(i). And as to the entirely of section 4, the Committee's only comment is:

> Section 4: Provides for a bipartisan commission of five members with terms of 6 years at an annual salary of $10,000. *Id.* at 3.

The House Committee's comments on S. 3285 were equally abbreviated. Like the Senate Committee's report, there is no specific comment on Section 4(i) in the report of the House Interstate and Foreign Commerce Committee on S. 3285, H. Rep. No. 1850, 73d Cong., 2d Sess. (1934). As to the entirety of Section 4, however, the following comment appeared:

> Section 4 provides for a bi-partisan commission of 7 members, holding office for 7-year terms at a salary of $10,000.[1] *It also provides for the appointment of personnel and contains other provisions usual in the case of the creation of a new administrative body.* *Id.* at 5 (emphasis added).

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[1] The 7-member, 7-year-term provisions substituted by the House for the 5-member, 6-year-term provisions proposed by the Senate were accepted by the Conference Committee.

At the same time, however, the Senate Interstate Commerce Committee stated:

> This bill is so written as to enact the powers which the Interstate Commerce Commission and the Radio Commission now exercise over communications. . . .
>
> In this bill many provisions are copied verbatim from the Interstate Commerce Act because they apply directly to communications companies doing a common carrier business, but in some paragraphs the language is simplified and clarified. These variances or departures from the text of the Interstate Commerce Act are made for the purpose of clarification in their application to communications, rather than as a manifestation of congressional intent to attain a different objective. S. Rep. No. 781, *supra,* at 3.

Section 4(i) was evidently derived from Section 17 of the Interstate Commerce Act, 24 Stat. 385, as amended, 49 U.S.C. § 17(3) (1964), and at the hearings on the proposed Communications Act, Interstate Commerce Commissioner McManamy testified:

> Presumably paragraph (i) of the section [4] is intended to cover the same ground as the following provision in section 17(1) of the Interstate Commerce Act:
>
> > "The [Interstate Commerce] Commission may, from time to time, make or amend such general rules or orders as may be requisite for the order and regulation of proceedings before it, or before any division of the Commission, including forms of notices and the service thereof, which shall conform, as nearly as may be, to those in use in the courts of the United States."

> This is the specific provision under which this [Interstate Commerce] Commission prescribes its rules of practice and the forms of pleadings before it. Paragraph (i) is more general in terms and may be sufficiently broad in scope to cover rules of practice and forms of pleading. Those matters are of such importance, however, that the question of the [Federal Communications] Commission's authority should not be left in doubt. Hearings on H. R. 8301 Before the House Committee on Interstate and Foreign Commerce, 73d Cong., 2d Sess. 90 (1934); Hearings on S. 2910 Before the Senate Committee on Interstate Commerce, 73d Cong., 2d Sess. 202 (1934).

The only legislative reference to Section 17 of the Interstate Commerce Act (as Section 14 of S. 1532, 49th Cong., 2d Sess. (1886) is found in the remarks of Senator Cullum, the sponsor of S. 1532:

> Section [17] relates to the conduct of the work of the Commission. 17 Cong. Rec. 3474 (1886).

APPENDIX E

Legislative History of Section 303(r) of the Communications Act of 1934, as Amended

Following the unfortunate loss of life as a result of fir at sea on the steamship *Morro Castle* (September 8, 1934) and the further loss of life as a consequence of the sink ing of the steamship *Mohawk* (January 24, 1935), S. Res 63 was introduced in the United States Senate on Januar 28, 1935, 79 Cong. Rec. 1039 (1935). That resolution, amon other things, requested the Senate Committee on Com merce to initiate inquiries into the circumstances of thos two disasters, as well as the broader question of safet of life at sea, and to make recommendations to Congres on what measures might be taken to better insure the safet of life and property at sea in the future. In the word of the Senate Commerce Committee:

> The *Morro Castle* and the *Mohawk* disasters move the Senate of the United States to adopt a resolutio requesting the Committee on Commerce of the Senat or a subcommittee thereof to conduct a study of th causes of these disasters, to make studies which migl throw light on the question of safety of life at se and to make recommendations to the Congress fo greater security of persons and property at se The Committee on Commerce authorized its chairma to organize a Subcommittee of the Department Commerce and Merchant Marine, and this subcon mittee authorized the chairman, Senator Copelan to solicit the aid of technical experts in the wo directed by this Senate resolution. A technical co mittee of such experts was appointed. This gener technical committee gave special consideration the problem of radio, to the part radio plays in t navigation and operation of ships, and to its cont bution to safety. As a result of this study of t problem the bill, which the Commerce Committee n

reports, was prepared and introduced by Senator Copeland. S. Rep. No. 2060, 74th Cong., 2d Sess. 2-3 (1936).

The bill referred to was S. 4619, an amended version of S. 3954, introduced by Senator Copeland on January 11, 1937, the purpose of which was "to modernize our law with respect to radio installations and radio operations aboard ships to the end that safety at sea may be further assured." *Id.* at 1.

The FCC's view of the proposed legislation is found in the testimony of Lt. Commander E. M. Webster before the Senate subcommittee considering the measure:

> The primary purpose of the recommended legislation is to replace and modernize the Ship Act [of 1910, as amended in 1912] dealing with the equipping of ships with radio apparatus and the manning by operators for safety purposes. In view of the close relationship between the Ship Act and the Communications Act, 1934, it is believed both logical and necessary to combine the two in enacting new legislation to replace the Ship Act. Therefore it will be noted that the suggested legislation is in the form of amendments to the Communications Act; otherwise, it would necessitate a repetition of many provisions of the Communications Act in order to form a complete related whole.
>
> Both the Ship Act, enacted 25 years ago, and the Communications Act of 1934 are now inadequate as they do not provide by statute for the full utilization of radio as a major safety factor at sea. . . . Hearings on S. 3954 Before a Subcommittee of the Senate Committee on Commerce, 74th Cong., 2d Sess. 11 (1936). See also, statement of Irvin Stewart, *id.* at 8-9.

The main provisions of the bill were four: (1) A su stantial broadening of the category of ships required have radio communications equipment operated by qualifi operators, as well as radio direction-finder apparatus; (Detailed technical requirements for radio installations board ships, which requirements were in conformity wi those found in the 1929 International Convention on Safe of Life at Sea and the International Telecommunicati Convention; (3) A revision of earlier requirements regar ing the number, qualifications, functions and licensing operators of radio installations on board ships; (4) requirement that every motorized lifeboat required treaty or statute be fitted with radio equipment. *Id.* 3-4. "Other provisions of the bill," stated the Committ "are either redrafts of existing law or involve in t main non-controversial matters." *Id.* at 4.

Among those "other provisions" of S. 4619, Section of the 1934 Communications Act was proposed to amended to add a new subsection (o):

> For the purpose of obtaining maximum effectiven from the use of radio and wire communications connection with safety of life and property, the Co mission shall investigate and study all phases of t problem and the best methods of obtaining the coo eration and coordination of these systems. *The Co mission shall, by proper rules and regulations or conditions incorporated in the authorization or licen prescribe the conditions and procedure to be observ in harmony with the law, in communications involvi safety and property.* [Emphasis added.]

S. 4619 was passed by the Senate and sent to the Hou but was unable to be acted on by that body before t end of that session of the 74th Congress.

During the latter part of 1936, the International C vention on Safety of Life at Sea, London, 1929, was r

ed by the United States. And in the following year, on anuary 11, 1937, a bill essentially the same as the earlier . 4619 was introduced in the first session of the 75th ongress by Senator Copeland as S. 595. Its counterpart the House was H. R. 4191.

The earlier proposed addition of a subsection (o) to ction 4 of the Communications Act was preserved in both ie House and Senate bills. In addition, both bills proosed a new section 360(a) to the Communications Act:

> In addition to any other provision of law, the Commission shall make such rules and regulations, determinations, or findings as may appear to be necessary to give effect to the radio and communications provisions of the safety convention.

his provision was part of a proposed new Part II of itle III of the 1934 Communications Act, entitled "Radio quipment and Radio Operators on Board Ship," the ated purpose for which was ". . . to promote safety of fe and property at sea through the use of radio." S. 95, 75th Cong., 1st Sess. § 351 (1937).

During the hearings before both the Senate and House ommittees considering the measure, the Federal Communitions Commission recommended, among other things, iat the second sentence of section 4(o) and the entirety section 360(a) of the bill be deleted, and a new section 03(r) be substituted, as follows:

> (r) [Except as otherwise provided in this Act, the Commission from time to time, as public convenience, interest, or necessity require shall—] Make such rules and regulations and prescribe such restrictions and conditions, not inconsistent with law, as may be necessary to carry out the provisions of this Act, or any international radio or wire communications treaty or convention, or regulations annexed thereto, including any treaty

> or convention insofar as it relates to the use
> radio, to which the United States is or may her
> after become a party. Hearings on H. R. 41
> Before the House Committee on Merchant Mari
> and Fisheries, 75th Cong., 1st Sess. 2-3 (1937
> Hearings on S. 595 Before a Subcommittee of t
> Senate Committee on Commerce, 75th Cong., 1
> Sess. 12 (1937).

The reasons for the suggested change were contain
in a Statement by Anning S. Prall, then Chairman of t
FCC:

> In view of the fact that many of the situatio
> which will confront the Commission as a result
> the ratification of the safety convention and the p
> sage of this bill will be new, that changes in t
> rules and regulations may be desirable from time
> time, and that new international radio agreemen
> doubtless, will be effected in the future, it is i
> portant that the Commission should have author
> generally to prescribe such rules and regulations a
> to impose such restrictions and conditions as may
> necessary to administer the act as amended and exi
> ing or future international agreements concerned w
> radio and wire communication. *Such general author*
> *would permit the Commission to meet promptly a*
> *effectively situations which arise under the safety co*
> *vention, provisions of this bill, and international agr*
> *ments entered into in the future. Ibid.* (emphas
> added).

The bill, as reported out of the Senate Commerce Co
mittee, S. Rep. No. 196, 75th Cong., 1st Sess. (1937), a
as enacted, 50 Stat. 191, adopted the FCC's suggesti

APPENDIX F

FEDERAL COMMUNICATIONS COMMISSION

13345
PUBLIE NOTICE—B
February 28, 1968

WASHINGTON, D. C. 20554

Report No. 7063

BROADCAST ACTION

FCC Expresses Policy Regarding Refusal of Gulfport, Mississippi, Licensee To Accept Out-of-Town Advertising

The Commission has informed E. O. Roden & Associates, Inc., licensee of radio station WGCM, Gulfport, Mississippi, that WGCM's refusal to accept out-of-town automobile advertising ". . . in the circumstances of this case, is contrary to the public interest in that it operates to restrain and inhibit trade and competition . . ."

In a letter to Roden, the Commission requested the licensee to modify its policies and advise the Commission promptly of the action taken.

The Commission, in explaining the basis for its ruling, further stated "It appears from your statements to the Commission that you have a policy of not accepting advertising from automobile dealers located outside of Gulfport and Harrison County. This is not the result of a formal or explicit agreement between you and the Automobile Dealers Association, but you state that the matter has been discussed between your station and the automobile dealers, that the policy was initiated after you were told by local dealers that advertising by New Orleans dealers could create a hardship to the local industry, and that it could be presumed that local dealers might cancel advertising if advertising from other dealers was accepted.

"The antitrust laws of the United States prohibit any contract, combination or conspiracy in restraint of trade or commerce. A refusal to do or accept business from another arising out of such a contract, combination or conspiracy is one of the clearest and most restrictive of the prohibited types of conduct."

Max Fetty and Associates, Inc., a New Orleans, Louisiana, advertising agency, filed a complaint with the Commission on May 15, 1967, stating in part that WGCM agreed to accept advertising from Fetty on behalf of Gerry Lane Chevrolet of Bay St. Louis; aired one of the announcements; and then cancelled the agreement on grounds that Jay Jay Chevrolet-Buick Company in Gulfport had stated it would cancel its advertising unless the Gerry Lane spot announcements were withdrawn. Bay St. Louis is about 18 miles west of Gulfport.

Action by the Commission February 21, 1968, by letter. Commissioners Hyde (Chairman), Loevinger, Wadsworth, and Johnson, with Commissioner Bartley dissenting and issuing a statement, and Commissioner Cox concurring in the result.

BRIEF FOR INTERVENOR
KVOS TELEVISION CORPORATION

United States Court of Appeals

FOR THE NINTH CIRCUIT

No. 22,627

PORT ANGELES TELECABLE, INC.,
Petitioner,

v.

UNITED STATES OF AMERICA
and
FEDERAL COMMUNICATIONS COMMISSION,
Respondents,

KVOS TELEVISION CORPORATION,
Intervenor.

On Petition for Review of Memorandum Opinion and Order of the Federal Communications Commission

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INDEX

TABLE OF AUTHORITIES

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BRIEF FOR INTERVENOR KVOS TELEVISION CORPORATION

COUNTER-STATEMENT OF THE CASE

The Counterstatement of the Case set forth in the Brief of the Respondents is adopted by Intervenor KVOS Television Corporation (hereinafter "KVOS-TV").

ARGUMENT

Intervenor adopts the Brief of the Respondents. It addresses itself herein to Petitioner's contention that KVOS-TV would not be prejudiced by a waiver of the Commission's non-duplication rule and the resultant duplication of its programs by the Port Angeles CATV system.

Preliminarily, however, certain background facts set forth in Petitioner's Brief require correction and/or clarification. Petitioner makes much of the argument that its "allegations of fact" presented to the Commission in its Petition for Waiver were supported by an affidavit, as required by the Commission Rules, but that the factual assertions contained in KVOS-TV's Opposition were not so supported. The record herein shows that, in opposition to the sparse, indeed almost frivolous, allegations of "fact"[1] in the Petition for Review, KVOS-TV incorporated by reference the exhaustive factual showing made in a then-recent, similar case, involving the waiver request of Total Telecable, Inc. (which ultimately came before this very Court on a Petition for Review of Orders of the Federal Communications Commission (Case No. 21990)). The incorporated pleadings were even served on the Petitioner. This courtesy is now rewarded by Petitioner's argument, made for the first time in its Brief (see, *e.g.*, page 17, footnote 14), that this procedure failed

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[1] The Court should note that, under the Commission's procedures, a CATV system could obtain an automatic stay of the operation of the Commission's non-duplication rule simply by filing a request for waiver of the rule within 15 days of the demand for protection by the local broadcaster. The Commission's rules prescribe no particular form for the waiver request and, as is clear from the instant case, the filing of little more than a piece of paper with the words "Petition for Waiver" thereon sufficed to bring the automatic stay provisions into effect.

to comply with the Commission's Rule 74.1109 (c) (2). This argument is wholly without merit, since neither the Commission's rules nor its stated policies preclude the cross-referencing of related factual material from one similar case to another, a procedure which serves to avoid wasteful duplication.

The above is but one small example of the many arguments made by Petitioner for the first time to the Court. Indeed, except for the factual allegations that Seattle has closer ties to Port Angeles than does Bellingham, and that waiver of the Commission's rules would not prejudice KVOS-TV (assuming that the latter can be considered a "factual" assertion), Petitioner's entire factual and legal presentation was never made at the Federal Communications Commission level. The Commission's rules expressly provided to Petitioner an opportunity to make the contentions which it now presents to the Court. Arguments as to jurisdiction, fairness, etc., could have been presented initially in the Petition for Waiver, but they were not. Section 74.1109(e) provides a period of 20 days for the submission of a reply to comments or oppositions concerning requests for waiver of the rules, but Petitioner completely failed to take advantage of that opportunity. Finally, the Commission's rules (Section 1.106) provide for the filing of Petitions for Reconsideration of final Commission actions. Again, Petitioner ignored this opportunity to afford the Commission a chance to pass, in the first instance and as the appropriate forum, on its diverse allegations and arguments.

Petitioner also questions the Commission's failure to condition, and KVOS-TV's failure to contest, the grant of a license to KIRO-TV for a television broadcast translator station to operate in Port Angeles, rebroadcasting the programs of KIRO-TV in Seattle. The short answer to Petitioner's suggestion that KVOS-TV accedes to the translator operation because this incursion into its market is made by a "fellow

broadcaster" is that, in similar circumstances, KVOS-TV *has* petitioned the Commission to deny, designate for hearing, or condition the proposed television translator operation of KIRO-TV in Anacortes, Washington. That Petition to Deny, filed on April 6, 1965, was granted, in substance, by the Commission's Memorandum Opinion and Order of May 26, 1965, *KIRO, Inc.*, FCC 65-468, 5 Pike & Fischer R.R.2d 313 (1965). Even more importantly, Petitioner fails to advise this Court that the translator to which it has reference is a UHF translator, and that in the Second Report and Order, the Commission specifically dealt with the question of non-duplication protection for VHF television stations vis-a-vis UHF translators. "In view of [its] policy of encouraging UHF", the Commission decided not to impose non-duplication conditions on UHF translator grants for facilities to operate in an all-VHF area. Second Report and Order, paragraph 86a, 2 FCC2d 725, 759 (1966).

THE COMMISSION'S BALANCE OF CATV AND BROADCASTING INTERESTS IS REASONABLE AND PROPER

The basis of the Commission's non-duplication rule has been set forth in a number of briefs filed by the Commission and by other parties in this Court. See, *e.g.*, Respondents' Brief in *Total Telecable, Inc. v. Federal Communications Commission and United States of America,* Case No. 21990; and Respondents' Brief and Brief for Intervenors in *Great Falls Community TV Cable Co., Inc. v. Federal Communications Commission and United States of America,* Case No. 22393. Briefly, the Commission, having considered voluminous comments in an appropriate rule-making proceeding, concluded that the non-duplication rule was required to permit CATV to complement the broadcast services by making available a greater choice of programming and, at the same

time, to remove the threat that unfettered CATV growth would destroy local television service, with its valuable service to rural areas.

The validity of the Commission's approach becomes manifest when viewed in the context of its overall scheme of national television allocations. Channels are assigned to various communities in the United States in a Table of Allocations, set forth in Section 73.606 of the Commission's Rules. The Commission's assignment of a channel to Bellingham, and the operation of KVOS-TV, would be greatly frustrated if, for example, eight television stations were authorized to operate in Port Angeles or, more particularly, if a television station operating in Port Angeles were permitted to duplicate the programs of KVOS-TV. Yet, the operation of the Port Angeles CATV system has essentially the same effect on KVOS-TV's assignment, unless the Commission's non-duplication rule is brought into play to restore the situation to something approaching normalcy.

Petitioner points out (Brief, p. 54) that, under the Commission's Rules, a television station can bargain for exclusive distribution of television network programs only in its principal community. However, this revelation totally obscures the relevant fact that the local station's network rate is based upon the size of its audience in all of the television homes located throughout its service area. In this case, Port Angeles is located within KVOS-TV's service area, indeed within its Grade A service area, and it is important to understand that Petitioner's pirating of the same programs from a Seattle source, and its dissemination by wire of those programs into the television homes located within KVOS-TV's natural orbit, significantly threaten the viability of KVOS-TV's operation. In essence, Petitioner's CATV system engages in exactly the kind of unfair and harmful competition which the Commission's non-duplication rule is designed to avoid.

At no time, either before the Commission or before this Court, has Petitioner met its burden of showing how the Northwest Washington situation respecting its CATV operation within the Grade A service area of KVOS-TV differs in any significant way from the usual situation envisioned by the Commission in its promulgation of the rule in question. The conclusionary allegations that Port Angeles has some kind of closer affinity to Seattle than to Bellingham and that KVOS-TV derives a portion of its revenue from its Canadian audience are, as the Commission properly found, irrelevant and unpersuasive. The fact remains that KVOS-TV's network rate is calculated on the basis of the size of its American audience. That audience includes Port Angeles and it is fragemented and diluted to the extent that Petitioner carries, on the same day, the exact same programs as are broadcast by KVOS-TV. Moreover, this Court, appropriately, can and should take notice of the fact that Petitioner's system is not the only one operating within the KVOS-TV service area. See *Total Telecable, Inc. v. Federal Communications Commission and United States of America, supra.* The cumulative effect of these CATV incursions into KVOS-TV's service area is a matter of legitimate concern and it supports the propriety of the Commission's determination that the overall television structure should not be threatened as a consequence of piece-meal consideration of ad hoc cases. Compare *Interstate Broadcasting Co., Inc. v. Federal Communications Commission,* 109 U.S. App. D.C. 190, 285 F.2d 270 (1960); *Id.,* 109 U.S. App. D.C. 260, 286 F.2d 544 (1960).

The Commission's non-duplication rules do not operate to deprive the public of any programs[2] broadcast by the Seattle stations, since the rules only require the deletion of the identical programs which are broadcast over KVOS-TV. There is, consequently, no significant loss of programs to the public. This fact underscores the validity of the Commission's balance of the conflicting interests of CATV and broadcasting and supports the affirmance of the Commission's order in this case.

Respectfully submitted,

KVOS TELEVISION CORPORATION

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May 24, 1968

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[2] It is important for the Court to consider that the Rule is designed to avoid the duplication of *programs* carried over the CATV system in the 24-hour period during which the same programs are broadcast by the protected, local television station. It may well be, as Petitioner suggests, that "some" commercial announcements are caught up in the blackout requirement. However, it is clear that this is merely an incidental concomitant of the thrust of the Commission's Rule; indeed, even Petitioner could not delineate the extent to which such commercial deletions would result from enforcement of the Commission's Rule.

CERTIFICATE

I certify that, in connection with the preparation of this brief, I have examined Rules 18, 19 and 39 of the United States Court of Appeals for the Ninth Circuit, and that, in my opinion, the foregoing brief is in full compliance with those rules.

/s/ PAUL DOBIN

REPLY BRIEF

IN THE

United States Court of Appeals

FOR THE NINTH CIRCUIT

Case No. 22,627

PORT ANGELES TELECABLE, INC., *Petitioner*

v.

UNITED STATES OF AMERICA and
FEDERAL COMMUNICATIONS COMMISSION, *Respondents*
KVOS TELEVISION CORPORATION, *Intervenor*

On Petition for Review of Memorandum Opinion and Order of the Federal Communications Commission

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TABLE OF CONTENTS

TABLE OF AUTHORITIES

CASES:

Page

UNITED STATES CONSTITUTION:

STATUTES:

RULES AND REGULATIONS:

IN THE

United States Court of Appeals

FOR THE NINTH CIRCUIT

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On Petition for Review of Memorandum Opinion and Order of the Federal Communications Commission

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REPLY BRIEF

Comes now Port Angeles Telecable, Inc., petitioner herein, and pursuant to Rule 18 of the Rules of this Court, replies to the Brief for Respondents dated May 24, 1968 and the Brief for Intervenor bearing the same date.

Statement of Questions Presented

Respondents claim that the following question calls for an answer:

> "Whether section 405 of the Communications Act, 47 U.S.C. Section 405, bars review of claim of error which were not presented to the agency." (Brief for Respondents, p. 8).

All of petitioner's legal and constitutional arguments were presented in substance to the Commission in the proceedings which led to the issuance of the *First* and *Second Report and Order*. Petitioner so stated in its Brief (Brief for Petitioner, pp. 11, 28, 29, and 56). Respondents and Intervenor have not denied this in their Briefs. To the contrary, Respondents have acknowledged that fact, stating:

> "The restrictions to which Port Angeles is now subject were imposed after a rulemaking proceeding in which all the legal and policy issues were fully explored. Petitioner had every procedural opportunity to which it is entitled to participate in that rulemaking, and did so through its participation in a trade association which filed comments with the Commission." (Brief for Respondents, p. 21).

In its Memorandum Opinion and Order released January 23, 1968 (R. 0015), by which the Commission denied Petitioner's Request for Waiver (R. 0016) of the nonduplication of Section 74.1103(e) of the Rules of the Commission (47 C.F.R. 74.1103(e)), adopted March 8, 1966 (attached to petitioner's Brief as Appendix A), the Commission did not rely on special findings, but it relied entirely on its findings and legal arguments in the *Second Report and Order* (See, for example, R. 0016 and Brief for Respondents, pp. 7 and 11). The Commission cannot itself rely entirely on the *First* and *Second Report and Order* for its findings and legal arguments in this case and, in turn, deny to petitioner the right to rely on the legal and constitutional arguments which it filed in the proceedings which

led to those orders through its trade association. The Commission is seeking to compel petitioner to abide by the *Second Report and Order* and all of the legal and constitutional arguments presented by petitioner in the instant case were presented to the agency in substance in the proceedings which led to the *First* and *Second Report and Order* of which this denial of a *Petition for Waiver* filed pursuant thereto is part and parcel.

Argument

Respondents state that "In its request for waiver, Port Angeles did little more than allege that KVOS-TV would not be injured by grant of the requested relief." (Brief for Respondents, p. 9). Petitioner in its Petition for Waiver (R. 0001-0008, R. 25) stated many facts which proved KVOS-TV would not be adversely affected (R. 0004-0006, R. 25, R. 26 and Brief for Petitioner, pp. 12-13). The fact, which was not denied and is not in dispute, that Television Station KVOS serves a potential of 368,200 television households in British Columbia and only 145,700 such households in the United States (R. 0005 and R. 26) and that it caters to advertisers within its Canadian coverage (R. 0004 and R. 26) is not a fact applicable to most or to the average television station in the United States for which the *Second Report and Order* was adopted. The fact that Port Angeles is a Seattle suburb and that Seattle advertisers cater to the Port Angeles market while Bellingham advertisers do not (R. 0004 and R. 27) tends to prove that KVOS would not lose advertising and, therefore, would not be financially injured. If the Commission's non-duplication rule was adopted to protect the television station, it would fail to accomplish its objective in this case and the waiver should have been granted. The Commission or KVOS could have presented facts to dispute these contentions but they did not. The Commission could and should have ordered a hearing to determine the facts. The Commission simply chose to say the *Second Report* applies

and KVOS' pleading before the Commission and before this Court simply states it has a right to the protection under the Second Report. The Commission concedes its arbitrariness when it states, in effect, that even if petitioner had proven irrefutably that KVOS would not be injured, it would not have granted the waiver. (R. 0015, par. 2 and Brief for Respondents, pp. 11 and 12). This is injustice by the numbers. Provided the Commission feels the remedy is suitable to most television stations, then all of them are entitled to the protection. This follows in spite of the fact that the CATV industry and petitioner through their trade association asked for and were denied an evidentiary hearing, in the proceedings which led to the *First and Second Reports and Orders,* in order to prove or disprove the fact or myth that CATV operators have an economic impact upon television stations (Brief for Petitioners, pp. 55 and 56).

Respondents' reliance upon United States v. *Storer Broadcasting Co.*, 351 U.S. 192 (1956), and other cases (Brief for Respondents, p. 10) is of no avail to them, because petitioner did state in its Petition for Waiver reasons, sufficient if true, to justify a change or waiver of the rule in question which rule could serve no useful purpose if petitioner's allegations were true. The Commission did not bother to check into the facts or to order a hearing to establish the accuracy or the truth or falsity of petitioner's statements.

As in *Presque Isle TV Co., Inc.* v. *United States,* 387 F. 2d 502 (1st Cir. 1967), the facts presented a unique factual situation to which the Commission had not addressed itself in the *Second Report.* Nowhere in the *Second Report* is there an indication that the rules were meant to apply to a television station (like KVOS) which derives its advertising revenue exclusively or almost exclusively from Canadian markets so that carriage of other American television stations' programs (such as from Seattle) will

not deprive the other station (KVOS) of its advertising revenue. In the *Presque Isle* case, the United States Circuit Court for the Fourth Circuit remanded the case to the Commission to ascertain the truth or falsity of the CATV system operator's claims. Furthermore, nowhere in the *Second Report* is there an indication that the Commission will apply its non-duplication rules, if all the signals of the television stations involved are received by people throughout the CATV community with the use of roof-top or rabbit-ear antennas. Under such circumstances, the purpose of the rule is non-existent and constitutes an unjust discrimination against the subscribers of the CATV system and the owners of the CATV system. This interpretation of its rules is violative of the due process clause of the Fifth Amendment to the Constitution of the United States. (Brief for Petitioner, pp. 58-60).

Respondents state that the burden on the injury question plainly falls on the party seeking an exemption from the ordinary operation of the rule. (Brief for Respondents, p. 9). This is the manner in which the Commission protects television stations regardless of need. The television station knows what its profits are and to what extent, if any, it is being injured by CATV operators. It must file a financial statement with the Commission each year outlining its revenues, expenses and profits. This statement is not made available for public inspection and it may be obtained in a hearing only if the opponent requests it and if the station itself alleges adverse economic impact.

In a case such as this one, wherein the Commission has the sole discretion under its rules (Rule 74.1109(f), Brief for Petitioner, Appendix A, at p. 6.a.) to order a hearing, there is no way in which one who files a Petition for Waiver can obtain these financial records of the complaining television station in order to be able to bear the burden of proving that his CATV operations will not adversely affect the television station, unless a hearing is held. Even if a

hearing is held, if the television station lets the Commission's staff proceed to resist the Petition for Waiver, as most television stations do, and the television station does not allege that it will be adversely affected, the Commission will deny access to the financial returns of the television station.

Instead of protecting the viewing public's right to view the television signals of its choice and placing upon the television station requesting protection the burden of proof of establishing that the particular CATV system will adversely affect its financial status, the Commission has loaded its *Second Report and Order* with an irrebuttable presumption that the television station will be adversely affected through the duplication of its programs by another television station on the CATV system.

This the Commission decided in the face of the fact that the average commercial television station currently makes about 100% return on its capital investment each year before taxes and depreciation (R. 34 and Brief for Petitioner, p. 24). This was not denied by Respondents or Intervenor.[1]

Section 405 of the Communications Act does not preclude review of petitioner's contentions because the Agency did have the opportunity to and did rule upon all of them.

Respondents raise the same objection as they did earlier in this case with respect to petitioner's request for an injunction against the Commission pendente lite which injunction was granted. Respondents state:

> "Section 405 of the Communications Act 47 U.S.C. § 405, unequivocally establishes that no "question of fact or law" may be raised on appeal which petitioner has not first raised before the Commission." (Brief of Respondents, p. 13).

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[1] See current article by Commissioner Nicholas Johnson of the FCC in which he states that "television broadcasters average a 90 to 100 percent return on tangible investment annually." "Media Barons and The Public Interest," The Atlantic, June 1968, p. 43, at p. 48.

The short answer to this is that all of the questions of fact and law in this case were raised before the Commission. ("See Statement of Questions Presented," *supra,* at page 2).

None of the cases cited by Respondents involve a factual situation similar to the one in the instant case. In the instant case, contrary to the situations in the cases cited by the Commission, petitioner has averred and Respondents have conceded that "all the legal and policy issues were fully explored." (Brief for Respondents, p. 21, and see "Statement of Questions Presented," *supra,* at page 2.)

Respondents quote from 47 U.S.C. 405 (Brief for Respondents, p. 13, f.n. 8). The last part of the quotation does establish that the filing of a petition for rehearing before the Commission thereunder is a condition precedent to judicial review where the party seeking such review relies on questions of fact or law upon which the Commission, or designated authority within the Commission, has been afforded no opportunity to pass.

In the instant case, the Commission has had the opportunity to pass upon all the legal and constitutional questions and simply ignored some of them, but did rule upon others in the *First Report and Order,* 38 F.C.C. 683 (1965) and in the *Second Report and Order,* 2 F.C.C. 2d 725 (1966). The great number of Petitions for Waiver of the *Second Report and Order* which are filed by individual CATV operators without the services of a lawyer do not contain legal or constitutional grounds, as in the case of petitioner. The Commission invited this by providing for an informal petition in Rule 74.1109(b) (Brief for Petitioners, Appendix, p. 5.a.).

In the case of *Presque Isle TV Co., Inc.* v. *United States,* 387 2d 502 (1st Cir., 1967), upon which Respondents so heavily rely, petitioner therein had not alleged that the

agency had an opportunity to pass upon the legal and constitutional questions, so the case is inappropriate with respect to its application to the instant case. The same is true of the other cases cited by Respondents.

The Court must interpret very strictly statutes which purport to limit the constitutional rights of a litigant, such as the right of due process of law pursuant to the Fifth Amendment to the Constitution of the United States.

The question of jurisdiction of the Commission, at the very least, can be raised, because to hold inquiry into this matter foreclosed, if in fact there is no jurisdiction in the Commission, would be a usurpation of authority that the Congress has not conferred. Cf. *Mansfield, C. & L. M. Ry.* v. *Swan,* 1884, 111 U.S. 379; *Louisville & N.R.R.* v. *Mottley,* 1908, 211 U.S. 149; *Treinies* v. *Sunshine Mining Co.,* 1939, 308 U.S. 66, 70; *United States* v. *L. A. Tucker Truck Lines, Inc.,* 1952, 344 U.S. 33; *Manual Enterprises, Inc.* v. *Day,* 1962, 370 U.S. 478, opinion of Mr. Justice Brennan at 499, n.5.

In the case of *NLRB* v. *Ochoa Fertilizer Corp.,* 1961, 368 U.S. 318, although the Supreme Court of the United States applied a restriction on appeal where contrary to the instant case, the agency had not had an opportunity to pass upon certain questions of law, the Court mentioned a possible exception where the agency "patently traveled outside the orbit of its authority (at p. 322). There can be no doubt that the Commission is venturing into new fields in attempting to create new rights in the copyright field and in creating new rules of "fair competition", is patently travelling outside the orbit of its authority (Brief for Petitioner, pp. 53-57). This is a case where the Commission is attempting to exercise an authority entirely foreign to and inappropriate for this particular agency, and the case of *Presque Isle TV Co., Inc.* v. *United States, supra,* which is relied upon by Respondents, recognized this exception.

Furthermore, in this case, if Section 405 of the Communications Act, *supra,* were interpreted as suggested by Respondents, petitioner effectively would be deprived of the opportunity to present its case to a Court prior to the Commission's order taking effect. Petitioner would have to spend many thousands of dollars to carry out the Commission's non-duplication Rules (R. 32) and petitioner's subscribers would be deprived of the television programs of their choice (R. 32 and 33) and the public would be deprived of information and advertising messages (R. 31, Brief for Petitioner, p. 21) before a court could examine the legality or constitutionality of the Commission's action.

This follows from the fact that Section 74.1109(h) of the Commission's non-duplication rules provides:

Where a Petition for Waiver of the provisions of § 74.1103(a) of this chapter is filed within fifteen (15) days after a request for carriage, the system need not carry the signal of the requesting station pending the Commission's ruling on the petition or on the interlocutory question of temporary relief pending further procedures. (Memorandum Opinion and Order of the Federal Communications Commission in Docket No. 15971, Released on April 21, 1966).

This has been interpreted later by the Commission to apply to the non-duplication provisions of 74.1103 as well.

Accordingly, when the television station requested non-duplication, as Intervenor did in this case, petitioner had only 15 days within which to file a petition for Waiver. Under Rule 74.1109(b) (Brief for Petitioner, Appendix, p. 5.a) "the petition may be submitted informally." Under 74.1109(c) (Ibid.), the petition "shall state fully and precisely all pertinent facts and considerations relied upon *to demonstrate the need for the relief requested and to support a determination that a grant of such relief would serve the public interest.*" (Emphasis supplied.)

Petitioner's manager followed this informal procedure. He supplied all the information requested in the Commission's Rules. Rule 74.1109 mentions nothing about legal or constitutional objections to the *Second Report and Order* having to be filed in the Petition for Waiver. All the Commission asks for is "all pertinent facts and considerations relied upon to support a determination that a grant of such relief would serve the public interest." Petitioner obviously could not have economic studies conducted within the 15 days, although if a hearing had been ordered, he could have done so.

Until petitioner was requested by a television station to afford it non-duplication, the *Second Report and Order* did not adversely affect petitioner in an immediate way. Intervenor might never have asked for this protection. When Intervenor did request such protection, then Intervenor had only 15 days within which to file his Petition for Waiver and in that short a time he could only state facts which, if true, called for a change or waiver of the *Second Report and Order* in the way it affected petitioner's operations. This he did. The Commission could have granted the waiver based upon petitioner's petition supported by affidavit or it could have ordered a hearing to explore the facts further. The Commission did neither. It arbitrarily and summarily denied the Petition for Waiver.

At this point, petitioner retained counsel. If a Petition for Rehearing pursuant to 47 U.S.C. 405 then had been filed, petitioner would have had to comply with the non-duplication rules and incur many thousands of dollars, because the Commission is notoriously slow in processing pleadings. For instance, petitioner filed its Petition for Waiver in this case on September 14, 1966 (R. 0001) and the Commission released its Memorandum Opinion and Order or decision in this case on January 23, 1968. (R. 0015). The Commission has uniformly and consistently ruled that the filing of a Petition for Reconsideration does

not stay the effective date for compliance with the Rules. *Teleprompter of Liberal, Inc.,* 9 Pike & Fischer, RR 2d 1291 (1967). Besides, Sec. 405 of the Communications Act provides "No such application shall excuse any person from complying with or obeying any order, decision, report, or action of the Commission, or operate in any manner to stay or postpone the enforcement thereof, without the special order of the Commission. The Commission refuses to issue such special orders, except if an appeal is taken to the Courts after the Petition for Rehearing is denied and then it gives a party only about two weeks within which to apply to the Court if the time for appeal has not then expired. If a Petition for Rehearing or Reconsideration is pending before the Commission, it will not grant a stay of its order.

The result of this series of rules and policies is that the Commission effectively has insulated itself against a review of its actions in the Courts, if the Commission's interpretation of 47 U.S.C. 405 is correct under the circumstances of this case.

Petitioner cannot both file a Petition for Rehearing before the Commission and at the same time file a Petition for Review before a United States Court of Appeals. The Commission would have the Court appeal thrown out upon the grounds that the matter was still under consideration by the Commission.

The *Second Report and Order* was adopted without an evidentiary hearing being held, althopgh petitioner through its trade association requested an evidentiary hearing so that the facts could be established after cross-examination of the television broadcasters and CATV operators. This request was denied. Petitioner, through its trade association presented all the legal arguments presented in this case to this Court (R. 24, 25, 33; Brief for Petitioner, pp. 11, 28, 29, 56). The Commission rests its denial of the Petition for Waiver upon its findings and its legal arguments

in the *Second Report and Order,* but it then insists that the same legal and constitutional arguments had to be raised anew in this Petition for Waiver. In all cases where a CATV operator has retained a lawyer from the moment that a television station made a demand upon him for non-duplication or carriage, and these same legal arguments were included in the Petition for Waiver, the Commission has said that these legal arguments have no validity and the Commission has rested upon its *Second Report and Order* in denying relief. This agency has definitely been afforded an opportunity to pass upon the legal questions which have been raised by petitioner in this case, both in the proceedings which led to the issuance of the *Second Report and Order* upon which the Commission's rules affecting petitioner are based and in many similar Petitions for Waiver, and the Commission has denied their validity.

If the Commission is allowed to preclude Court review upon these technical and inapposite arguments, hundreds of CATV operators who have Petitions for Waiver on file with the Commission and who have not included legal and constitutional arguments will never have an opportunity to test the validity and reasonableness of the Commission's Rules. This would mean that they have in effect been baited by the Commission into filing an *informal* Petition for Waiver without knowing that such an informal petition was a booby-trap that would explode their right to a Court review. Any such interpretation limiting their constitutional rights is to be avoided if at all possible. Unless the remedy in the statute is exclusive, one must have an opportunity to test the validity of the orders of an agency before one is made to spend many thousands of dollars and risk financial failure in complying with the agency's rules or risk penalties under the Act. *Abbott Laboratories, et al.* v. *John W. Gardner, Secretary of Health, Education and Welfare, et al.,* 387 U.S. 136.

It is undoubtedly to avoid a result such as that advocated by the Commission in this case that Section 414 of the Communications Act provides:

> Nothing in this Act contained shall in any way abridge or alter the remedies now existing at common law or by statute, but the provisions of this Act are in addition to such remedies. (47 U.S.C. 414).

The Constitution of the United States is the highest statute in the land. A similar provision (701(f)(6)) in the Federal Food, Drug and Cosmetic Act (21 U.S.C. § 301 et seq.) caused the Supreme Court of the United States to allow a remedy in the Abbott Laboratories case, *supra*. In that case the Supreme Court stated:

> The question is phrased in terms of "prohibition" rather than "authorization" because a survey of our cases shows that judicial review of a final agency action by an aggrieved person will not be cut off unless there is persuasive reason to believe that such was the purpose of Congress. *Board of Governors* v. *Agnew,* 329 U.S. 441; *Heikkila* v. *Barber,* 345 U.S. 229; *Brownell* v. *Tom We Shung,* 352 U.S. 180; *Harmon* v. *Bruckner,* 355 U.S. 579; *Leedom* v. *Kyne,* 358 U.S. 184; *Rusk* v. *Cort,* 369 U.S. 367. Early cases in which this type of judicial review was entertained, e.g. *Shields* v. *Utah Idaho Central R.R.,* 305 U.S. 177; *Stark* v. *Wickard,* 321 U.S. 288, have been reinforced by the enactment of the Administrative Procedure Act, which embodies the basic presumption of judicial review to one "suffering legal wrong because of agency action, or adversely affected or aggrieved by agency action within the meaning of a relevant statute," 5 U.S.C. § 702, so long as no statute precludes such relief or the action is not one committed by law to agency discretion, 5 U.S.C. § 701(a). The Administrative Procedure Act provides specifically not only for review of "Agency action made reviewable by statute" but also for review of "final agency action for which there is no other adequate remedy in a court," 5 U.S.C. § 704. The legislative material elucidating that seminal act manifests a congressional intention that it covers a broad spectrum

of administrative actions,[2] and this Court has echoed that theme by noting that the Administrative Procedure Act's "generous review provisions" must be given a "hospitable" interpretation. *Shaughnessy* v. *Pedreiro,* 349 U.S. 48, 51; see *United States* v. *Interstate Commerce Commission,* 337 U.S. 426, 433-435; *Brownell* v. *Tom We Shung,* supra; *Heikkila* v. *Barber,* supra. Again in *Rusk* v. *Cort, supra,* at 379-380, the Court held that only upon a showing of "clear and convincing evidence" of a contrary legislative intent should the courts restrict access to judicial review. See also Jaffe, Judicial Control of Administrative Action 336-359 (1965).

The case of *Buckeye Cablevision, Inc.* v. *FCC,* 387 F. 2d 220 (D.C. Cir., 1967), relied upon by Respondents (Brief for Respondents, p. 16, f.n. 11) is irrelevant. The case did not involve a factual situation to the instant case and did not raise the same legal questions, except with respect to jurisdiction.

Respondents rely upon *Wheeling Antenna Co., Inc.* v. *U. S. and FCC,* F. 2d (4th Cir., decided February 28, 1968). (Brief for Respondents, pp. 17 and 18) to deny that the non-duplication rule involves an illegal taking of property. The case is not in point.

In that case, appellant did not challenge the procedural correctness of the adoption of the *Second Report and Order* and did not attack the reasonableness of the Commission's Rules.

As this Reply Brief is about to be sent to the printer on June 10, 1968, word has come down that the Supreme Court of the United States on this day has ruled that the Com-

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[2] See H.R. Rep. No. 1890, 79th Cong., 2d Sess., 41 (1946): "To preclude judicial review under this bill a statute, if not specific in withholding such review, must upon its face give clear and convincing evidence of an intent to withhold it. The mere failure to provide specially by statute for judicial review is certainly no evidence of intent to withhold review." See also S. Rep. No. 752, 79th Cong., 1st Sess., 26 (1946).

mission does have jurisdiction over CATV systems.[3] The Court did not rule upon the reasonableness or the validity of the *Second Report and Order*. Accordingly, all of the issues in the instant case are still before this Court, except the question of the basic jurisdiction of the Commission over CATV systems.

Conclusion

For all the foregoing reasons the action below should be reversed and relief as prayed (Brief for Petitioner, p. 64) be granted to petitioner.

Respectfully submitted,

PORT ANGELES TELECABLE, INC.

By /s/ E. STRATFORD SMITH
E. Stratford Smith

By /s/ ROBERT D. L'HEUREUX
Robert D. L'Heureux

June 13, 1968.

Certificate

We certify that in connection with the preparation of this Brief, we have examined Rules 18, 19 and 39 of the United States Court of Appeals for the Ninth Circuit, and that in our opinion, the foregoing Brief is in full compliance with those rules.

By /s/ E. STRATFORD SMITH
E. Stratford Smith

By /s/ ROBERT D. L'HEUREUX
Robert D. L'Heureux
Attorneys

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[3] *Southwestern Cable Co., et al.* v. *United States of America and Federal Communications Commission* (378 F. 2d 118—C.A. 9, 1967); *United States of America and Federal Communications Commission* v. *Southwestern Cable Co., et al.* (Case No. 363. October Term, 1967) on certiorari to the Supreme Court of the United States.

IN THE UNITED STATES COURT OF APPEALS
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No. 22627

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v.

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Respondents,

KVOS TELEVISION CORPORATION,
Intervenor.

ON PETITION FOR REVIEW OF A MEMORANDUM OPINION AND
ORDER OF THE FEDERAL COMMUNICATIONS COMMISSION

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SUBJECT INDEX

TABLE OF AUTHORITIES

Cases:

IN THE UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

No. 22627

PORT ANGELES TELECABLE, INC.,
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ON PETITION FOR REVIEW OF A MEMORANDUM OPINION AND ORDER OF THE FEDERAL COMMUNICATIONS COMMISSION

BRIEF FOR RESPONDENTS

JURISDICTIONAL STATEMENT

This case arises from a memorandum opinion and order of the Federal Communications Commission, released January 23, 1968, denying petitioner's request for waiver of section 74.1103(e) of the Commission's rules dealing with the regulation of community antenna television systems. The petition for review was filed under section 402(a) of the Communications Act of 1934, as amended, 47 U.S.C. section 402(a). Jurisdiction of this court rests on section 2 of the Judicial Review Act, 28 U.S.C. section 2342. Venue in this judicial circuit is based on 28 U.S.C. section 2343.

COUNTERSTATEMENT OF THE CASE

Many of the basic facts are not in dispute: Port Angeles Telecable, Inc , operates a CATV system in Port Angeles, Washington, which currently carries eight television signals. Three of these emanate from Canadian stations, four from Seattle stations and the eighth from KVOS-TV, Bellingham, Washington. The CATV system receives and amplifies these signals and distributes them to subscribers homes for a monthly fee.

Under section 74.1103 of the Commission's rules, 47 CFR section 74.1103, CATV systems must refrain from duplicating on the same day any program broadcast by a station entitled to priority and non-duplication protection as against the signal of the duplicating station. In this case KVOS-TV, in Bellingham, requested that Port Angeles provide it with protection against program duplication through the carriage of KIRO-TV, Seattle, which is affiliated with CBS, the same network with which KVOS-TV is affiliated.[1/] Under the rules, KVOS is entitled to this protection because it places a stronger signal over Port Angeles than any of the Seattle stations. In other words, whenever KVOS-TV and KIRO-TV broadcast the same programming within a 24 hour period, and both channels are being carried on the CATV, the signals of KIRO-TV must be deleted, in order to provide KVOS-TV with exclusivity in the presentation of that duplicated programming.[1-A/]

1/ Some question was also raised about KING-TV, Seattle, an NBC affiliate, since KVOS-TV carries some NBC programming (R. 0005-0006).

1-A/ There are, however, some limitations on this general principle. See infra, pp. 4-5

As it was entitled to do under the Commission's rules, Port Angeles declined immediately to honor KVOS-TV's request, and instead sought a waiver of the rule. In order to better understand the Commission's rejection of the requested waiver, a brief summary of the reasons for the rule follows.[2/]

1. The Non-Duplication Rule

The rule in question, section 74.1103, was adopted in the Second Report and Order, 2 F.C.C. 2d 725 (1966), in order to assure that the developing CATV industry would not be destructive of the existing television allocation scheme. After carefully reviewing the recent growth of the CATV industry, the Commission found that in the nature of things the competition between CATV and the broadcaster was not inherently fair, 2 F.C.C. 2d at 778-779. A television station normally obtains the right to exhibit non-network programs by outright payments to program suppliers, from whom the station usually secures the exclusive right to exhibit the programs within a particular geographical area and for a particular length of time. The amount and kind of exclusivity that can be

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2/ In numerous briefs previously filed in this court we have set out at great length the background considerations on which the Commission relied in adopting its present CATV rules, and we do not believe any purpose would be served by repeating those expositions here. Reference is made to respondents' brief filed in Southwestern Cable Co. v. F.C.C. and U.S., 378 F.2d 118 (Case Nos. 21,183, 21,192) cert. granted 389 U.S. 911; respondents' brief in Total Telecable, Inc. v. F.C.C. and U.S., Case No. 21,990. See also respondents' brief in Great Falls Community TV Cable Co., Inc. v. F.C.C. and U.S., Case No. 22,393.

created is restricted by the antitrust laws, but those laws permit the creation of substantial exclusivity as a normal incident of the program distribution process.

CATV systems presently stand outside this distribution process. They do not compete for network affiliation, nor for access to syndicated programs, feature films, or sports events. They are not concerned with bidding against competing broadcasters for the right to exhibit these programs nor with bargaining with program suppliers for time and territorial exclusivity. Moreover, because the distant station whose signal is carried has no control over the CATV's use of its signal, the question of whether a program should be exhibited through CATV facilities in any particular market cannot be the subject of bargaining or agreement between the distant station and the program supplier -- although the question of whether the same program should be rebroadcast in that market by a television station or a translator can be, and often is, the subject of such bargaining and agreement. The non-duplication rule attempts to correct this imbalance. It simply requires that when the same program is being broadcast on the same day by two or more stations whose signals are received by the system, preference must be given the local station through the deletion of the more distant station's signal.

This non-duplication protection applies to "prime time" network programs (i.e., those presented by the network between

6 p.m. and 11 p.m.) only if such programs are presented by the local station entirely within what is locally considered to be "prime time." Furthermore, a local station is only entitled to non-duplication protection on a cable system "against lower priority or more distant duplicating signals, but not against signals of equal priority * * *."[3/] Section 74.1103(e). Finally, the CATV system need not delete reception of a network program if, in doing so, it would leave available for reception of subscribers, at any time, less than the programs of two networks, or would deprive them of color reception of the program. Section 74.1103(g).

2. The Petition For Waiver

The most important ground advanced by Port Angeles in support of its waiver request was the allegation that Port Angeles is a Seattle and not a Bellingham, suburb, and that its residents are therefore more closely tied to Seattle than to Bellingham (R. 0001-0005). Port Angeles also argued that since KVOS-TV derives much of its revenues from the Canadian areas and populations it is able to serve, it would not be prejudiced by a grant of the

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3/ Under the rule, television signals are divided into four priorities in terms of signal strength: (1) principal community, (2) Grade A, (3) Grade B, and (4) translator stations. The Commission classifies television service areas into two grades:

"Grade A service is so specified that a quality acceptable to the median observer is expected to be available for at least 90% of the time at the best 70% of receiver locations at the outer limits of this service. In the case of Grade B service, the figures are 90% of the time and 50% of the locations." Sixth Report and Order, 1 Pike & Fischer, R.R. 91:601 at 630 (1952). Cf., Clarksburg Publishing Co. v. F.C.C., 96 U.S. App. D.C. 211, 215-216 n. 12, 225 F.2d 511, 515-16 n. 12 (1955).

requested waiver.

The Commission declined to waive the rule, concluding that the contentions were largely conclusionary in nature:

> No facts are alleged in support of the claims that the people of Port Angeles are "dependent upon Seattle in all regards" and that "Seattle advertisers cater to the Port Angeles market" while [Bellingham] advertisers do not. (R. 0015)

The Commission went on to note that even if these allegations were true, they were not sufficient to justify a waiver. It noted that compliance with the rules involved no more than the deletion of the network programming of KIRO, and that this deletion would occur only when KIRO was carrying network programming being carried in prime time within 24 hours by KVOS. It also noted that some KING-TV network programming might also have to be deleted because KVOS carried an unspecified amount of NBC programming, as does KING. The Commission observed that to the viewing public the availability of identical programming on two channels is of little practical significance.

The Commission also found that Port Angeles' arguments concerning service by KVOS to Canadian audiences and reliance by KVOS on Canadian revenues were unsupported and irrelevant, noting that KVOS is primarily an American station, and is licensed to operate as one.

Finally, the contention that KVOS would not be prejudiced was rejected. Finding that KVOS came within the protection require-

ments set out in the rules, the Commission noted that in its Second Report and Order, 2 F.C.C. 2d 725 (1966), it had found that stations situated like KVOS were entitled to limited protection of the program exclusivity for which they have bargained through the deletion of more distant programs duplicating their own. "It would be disruptive of KVOS-TV's audience in Port Angeles for its network programming to continue to permit that programming to be duplicated from Seattle. Our Second Report explains the reasons for requiring program exclusivity and Telecable has not shown that these reasons are not fully applicable here." (R. 0016)

Following denial of its waiver request, Port Angeles filed its Petition for Review in this court.

STATEMENT OF QUESTIONS PRESENTED

In respondents' view, the following questions are presented:

Whether the Commission acted reasonably and within its discretion in declining to grant Port Angeles a waiver of the CATV non-duplication rule.

Respondents believe that as to all the remaining issues raised in this case, a threshold question is presented, i.e.,

Whether section 405 of the Communications Act, 47 U.S.C. section 405, bars review of claims of error which were not presented to the agency.

If the Court should find that the issues raised by Port Angeles for the first time in this Court are properly before it, we believe the further questions presented may be stated as follows:

Whether the Commission has the authority to regulate nonmicrowave CATV systems.

Whether the nonduplication rule involves an illegal taking of property without due process of law.

Whether petitioner was constitutionally or by statute entitled to a hearing.

Whether the nonduplication rule is discriminatory or contravenes other Congressional purposes.

ARGUMENT

I. THE COMMISSION PROPERLY DECLINED TO WAIVE THE NON-DUPLICATION RULE.

There is no dispute that the non-duplication rule applies to the factual situation presented in this case. KVOS-TV, the station requesting non-duplication protection, places a predicted Grade A signal over Port Angeles, whereas the duplicating Seattle stations place only a predicted Grade B signal;[4/] accordingly, under the rule, KVOS-TV is entitled to protection against any Seattle signal which duplicates its own programming. Port Angeles argues, however (Br., pp. 53-57) that the Commission erred in refusing to waive the rule because KVOS-TV failed to show that it would be adversely affected if the waiver were granted.[5/] This reasoning totally misapprehends the operation of a waiver provision.

Contrary to Port Angeles' contention, the burden on the injury question plainly falls on the party seeking an exemption from the ordinary operation of the rule. In its request for waiver, Port Angeles did little more than allege that KVOS-TV would not be injured by grant of the requested relief (R. 0004-0006). There can be no question, however, that at the least a substantial portion of KVOS-TV's revenue depends on American audiences. Accordingly, Port Angeles' presentation is totally inadequate under

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4/ Port Angeles' argument (Br., p. 23) that the record fails to show which signal is stronger is disingenuous at best. In the absence of any evidence that the predicted signal strengths are not in fact present, there was no reason to question the greater strength of the KVOS-TV signal.

5/ The text of the rule is appended hereto as Appendix A-1.

section 74.1109 of the rules concerning waiver petitions:

> (c)(1) The petition shall state the relief requested and may contain alternative requests. It shall state fully and precisely all pertinent facts and considerations relied upon to demonstrate the need for the relief requested and to support a determination that a grant of such relief would serve the public interest.

Plainly, Port Angeles' brief, conclusionary allegations did not measure up to this requirement.[6/] See United States v. Storer Broadcasting Co., 351 U.S. 192 (1956), in which the Supreme Court held that waiver requests must be accompanied by reasons, sufficient if true, to justify a change or waiver of the rule in question. See also Federal Power Commission v. Texaco, 377 U.S. 33 (1964).

Nor is Port Angeles' reliance on Presque Isle TV Co., Inc. v. United States, 387 F.2d 502 (1st Cir., 1967) helpful to it here. In Presque Isle, the Commission was dealing with a unique factual situation to which it had not specifically addressed itself in the rule making and, accordingly, the Court held that the record demonstrated insufficient policy determinations to support the ad hoc result reached there. Here, on the contrary, the Commission has already reached a determination which by its own terms covers precisely the fact situation presented in this case.

6/ In Channel 9 Syracuse, Inc. v. F.C.C., 385 F.2d 969 (D.C. Cir. 1967), the Court said: "We do suggest, however, that in the emerging field of CATV, with respect to petitions for waiver of evidentiary hearings, the Commission should require greater factual specificity in petitions for waiver and in the proof . . ." Id at 975.

Accordingly, petitioner here had a much heavier burden in establishing justification for the relief sought. In any event, a more complete showing in this respect would have been unavailing because the policy determinations on which the rule is based do not turn on individual economic circumstances.

The Commission's non-duplication rule is based on the finding made in a rule making proceeding that "every station affected is entitled to appropriate carriage and non-duplication benefits, irrespective of the specific damage which any individual CATV system may do to the financial health of the individual station." First Report and Order, 38 F.C.C. 683, 713 (1965). The Commission explained this reasoning at great length (38 F.C.C. at 713-714):

> [W]e believe that the imposition of minimum carriage and nonduplication requirements by rule is required in order to ameliorate the adverse impact of CATV competition upon local stations, existing and potential. NCTA's argument that CATV has not yet caused any widespread demise of existing stations misses the point. As we have pointed out above it would be clearly contrary to the public interest to defer action until a serious loss of existing and potential service had already occurred, or until existing service had been significantly impaired. Corrective action after the damage has already been done, if not too late, is certainly much more difficult. . . This is one of those situations in which the public interest requires that conditions conducive to the sound future of television "be assured rather than left uncertain." United States v. Detroit Navigation Co., 326 U.S. 236, 241. This is particularly so, where we have two modes of service, one of which is almost completely dependent on the other for its product. In such circumstances, uncertainties should be resolved in favor of ensuring the healthy growth and maintenance of the basic service.

Indeed, it is frequently true that individual systems serving a limited number of subscribers pose no immediate threat to a station's viability. But it would be folly for the Commission to fragment the problem this way. Where, as the Commission found with respect to CATV, growth was occurring at a rapid rate and a potential for harm was shown, the fact that a particular system might show that its operation poses no immediate threat to an existing station is hardly sufficient to warrant an exemption. 7/

Similarly, Port Angeles failed to demonstrate that the cultural and economic ties between Port Angeles and Seattle were more significant than those between Port Angeles and Bellingham or that KVOS-TV was not responsive to the needs and interests of the Port Angeles viewers Indeed, the eighteen page record below readily demonstrates that petitioner laid before the Commission nothing but bare assertions as to the orientation of the Port Angeles viewers and their relationship to KVOS-TV.

7/ Significantly, this Court has already considered another proceeding in which a CATV system had refused to provide KVOS-TV with nonduplication protection. Total Telecable, Inc. v. F.C.C. and U.S.A. (Case No. 21,990) held in abeyance by order dated November 28, 1967.

II. SECTION 405 OF THE COMMUNICATIONS ACT PRECLUDES REVIEW OF CONTENTIONS NOT RAISED BEFORE THE COMMISSION. SINCE MANY OF PETITIONER'S ARGUMENTS WERE NOT RAISED BELOW, THEY ARE NOT PROPERLY BEFORE THE COURT.

In its brief Port Angeles has launched a wide ranging general attack on the Commission's jurisdiction to regulate CATV, the validity of the Commission's regulations, and the procedure followed below. Before the Commission it raised none of these contentions. Rather, it attempted to justify a waiver of the non-duplication rule based upon alleged lack of ties between the station requesting non-duplication protection and the community of the CATV, and the alleged lack of prejudice to the station if the rule were waived (R. 0001-0008). Port Angeles is therefore precluded from raising the broad issues for the first time on appeal.

Section 405 of the Communications Act, 47 U.S.C. §405, unequivocally establishes that no "question of fact or law" may be raised on appeal which petitioner has not first raised before the Commission.[8/] See also United States v. Tucker Truck Lines,

8/ In pertinent part 47 U.S.C. 405 states:

> A petition for rehearing must be filed within thirty days from the date upon which public notice is given of the order, decision, report, or action complained of . . . . The filing of a petition for rehearing shall not be a condition precedent to judicial review of any such order, decision, report, or action, except where the party seeking such review (1) was not a party to the proceedings resulting in such order, decision, report, or action, or (2) relies on questions of fact or law upon which the Commission, or designated authority within the Commission, has been afforded no opportunity to pass.

344 U.S. 33 (1952); Unemployment Commission v. Aragon, 329 U.S. 143, 155 (1946); Albertson v. F.C.C., 243 F.2d 209 (D.C. Cir., 1957); Florida Gulfcoast Broadcasters v. F.C.C., 352 F.2d 726 (D.C. Cir., 196[illegible]

In view of these authorities, it is clear beyond question that all of Port Angeles' claims, except for those dealing with the specific application of the rule in this case, are outside the scope of this appeal. The record below is silent on the broad issues argued in Port Angeles' brief since they were not asserted by petitioner and there is therefore nothing for this Court to review. Indeed, even as to the question of the Commission's jurisdiction (Br. pp. 10-40), it has been held that 47 U.S.C. §405 requires as a condition precedent to judicial review that the matter be raised before the agency. Presque Isle TV Co., Inc. v. United States, supra, at 504-506.

In that case the First Circuit held that a claim that the Commission lacks jurisdiction to regulate CATV was not properly before it because it had not been expressly presented to the Commission. After reviewing the relevant authorities in considerable detail, the Court concluded:

> We hold that even though the question of statutory interpretation was, strictly, a jurisdictional matter, it was a question of law which petitioners were obliged to raise ab initio. We believe that section 405 calls for this result and that no constitutional principles or public policy require us to construe it otherwise. 387 F.2d at 506

We respectfully submit that this reasoning is equally applicable here,

and that petitioner's claim that the Commission has no jurisdiction over its system cannot be considered now.[9/]

The only question the Commission passed on in this case was whether a waiver of the non-duplication rule should be granted. The Commission held in essence that the contentions offered in justification of a waiver were simply inadequate to overcome the general policy determinations reached in the rule making. This conclusion has been dealt with in Argument I, supra.

The remaining sections of this brief deal seriatim with the broad issues raised by petitioner. They need be considered only if the Court is of the view that these issues are properly raised at this time.[10/]

III. THE COMMISSION HAS THE AUTHORITY TO REQUIRE PETITIONER TO DELETE PROGRAMS BROUGHT IN FROM LOWER PRIORITY STATIONS ON THE SAME DAY THAT THESE PROGRAMS ARE BEING CARRIED OVER LOCAL STATIONS.

Port Angeles argues that the Commission lacks authority to regulate nonmicrowave CATV systems (Br., pp. 26-52). Admittedly, as Port Angeles is a nonmicrowave operator, it is not

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9/ Throughout its argument, Port Angeles notes that these issues were raised in the prior rule making which led to the adoption of the rule, and that, through its membership in a trade association which participated therein, petitioner presented its views to the agency. In view of the unequivocal language of section 405, however, this prior participation is not sufficient. United States v. Tucker Truck Lines, Inc., supra; Presque Isle, supra, at 505 n.4.

10/ Because petitioner has intermixed and proliferated its various arguments, it has proven impossible to deal with them in a form which appears to be responsive to the argument headings in petitioner's brief. We believe, however, that we have dealt herein with every substantial point raised by petitioner.

required to file any applications for authority to operate with the Commission, and is not subject to its jurisdiction as a licensee.

In Southwestern Cable Co. v. U.S., 378 F.2d 118 (1967), this Court held that the Commission's authority may be "exercised only against licensees or applicants." Since CATVs fall in neither category, the Court set aside a Commission order limiting the expansion of CATV systems in San Diego pending a hearing before the agency.[11] The Supreme Court granted the Government's petition for a writ of certiorari and the case has been briefed and argued. The major issue concerns the Commission's jurisdiction over CATV systems not served by microwave radio facilities, and it is anticipated that a decision will be forthcoming during this term of Court. A decision upholding the Commission's jurisdiction would be dispositive of the contentions raised by petitioner here. On the other hand, a decision adverse to the Commission on the jurisdictional issue would render the present appeal moot. Accordingly, we believe it is unnecessary to brief the jurisdictional issue at this time.[12]

11/ But see Buckeye Cablevision, Inc. v. F.C.C., 387 F.2d 220 (D.C. Cir., 1967), where it was held that CATV "as a form of wire communication which enlarges the signal range of licensee stations to the potential detriment of the entire regulatory scheme" is subject to Commission authority.

12/ In briefs previously filed in this court we have set out our view of this issue at great length. See n. 2, supra.

IV. THE NON-DUPLICATION RULE DOES NOT INVOLVE AN ILLEGAL TAKING OF PROPERTY. PORT ANGELES HAD NO STATUTORY OR OTHER R GHT TO A HEARING.

Port Angeles suggests (Br., pp. 56-7) that the alleged loss of subscribers and additional expense, brought about by operation of the non-duplication rule, is a taking of property without due process of law. It also argues (Br., pp. 57-58) that since it was engaged in its present activities prior to the adoption of the rules, it is a denial of due process to force it to comply with the restrictions imposed by the CATV rules.

We believe these arguments are without force. As we have discussed above, the non-duplication rule is designed to carry out the valid objective of imposing upon CATV systems that degree of regulation which will insure that CATV service will be of maximum benefit in distributing television signals to the American public without destroying the basic television service which gives them their substance:

> For its survival, of course, a station needs financial support. Commercial advertisements are a chief source and these are attracted by the number of a station's viewers, for they are the advertisers' prospective customers. Consequently, to insure its permanence a station is entitled to some protection against dilution of its coverage through CATV's introduction of the same programs from more removed stations. In weighing the hu.t to CATV against the help to TV, there are several considerations besides the hope of preserving the station as a local and national asset. One is the fact that the local station is put to substantial expense in procuring programs, while CATV has so far been able to use them without sharing this burden.

> On balance, we cannot say the Commission has not been impartial in fulfilling its obligations. Neither the rules nor their administration are shown to be unjust, including the particular rule now in suit. Seemingly, it represents a fair adjustment and accommodation of conflicting claims to first place in the public interest. Cf. Channel 9 Syracuse, Inc. v. FCC, supra, 385 F.2d 969, 971, and Carter Mountain Transmission Corp. v. FCC, supra, 321 F.2d 359, 363, cert. den. 375 US 951. The Commission's order is an evenhanded and justified execution of this policy . . . (Footnote omitted) Wheeling Antenna Co., Inc. v. U.S. and F.C.C., ___ F.2d ___ (4th Cir., decided February 28, 1968)

Petitioner's argument as to deprivation of property was disposed of as long ago as 1932 in connection with the functions of the Radio Commission. At that time in Trinity Methodist Church South v. Federal Radio Commission, 62 F.2d 850, 852 (D.C. Cir., 1932), cert. den. 288 U.S. 599, the Court, citing Chicago B. & Q. R. Co. v Illinois, 200 U.S. 561, 593, stated:

> If the injury complained of is only incidental to the legitimate exercise of governmental powers for public good, then there is no taking of property for the public use, and a right to compensation, on account of such injury does not attach under the Constitution.
>
> . .
>
> When Congress imposes restrictions in a field falling within the scope of its legislative authority and a taking of property without compensation is alleged, the test is whether restrictive measures are reasonably adapted to secure the purposes and objects of regulation If this test is satisfied, then "the enforcement of uncompensated obedience" to such regulation "is not unconstitutional taking of property without compensation or without due process of law" Atlantic Coast Line R. Co v. Goldsboro, 232 U.S. 548, 558 Cf. Reinman v. Little Rock, 237 U.S. 171 (1915), Hadacheck v. Los Angeles, 239 U.S. 394 (1915).

And as the Supreme Court stated in Federal Radio Commission v. Nelson Brothers Bond & Mortgage Co., 289 U.S. 266, 282 (1933):

> * * * This Court has had frequent occasion to observe that the power of Congress in the regulation of interstate commerce is not fettered by the necessity of maintaining existing arrangements which would conflict with the execution of its policy, as such a restriction would place the regulation in the hands of private individuals and withdraw from the control of Congress so much of the field as they might choose by prophetic discernment to bring within the range of their enterprises.

Thus, assuming that the Commission's promulgation of its CATV rules was a proper exercise of its statutory authority, their operation does not invade those rights of petitioner protected by Constitutional guarantees.[13/]

Closely related to the last argument is Port Angeles' contention that it was entitled to a hearing under relevant provisions of the Communications Act of 1934, as amended, and general principles of due process (Br., pp. 61-65). We emphasize again that no request for a hearing was ever made before the agency. Specifically, Port Angeles argues (Br., pp. 61-63) that it is entitled to a statutory hearing under section 309(e) of the Communications Act, 47 U.S.C. section 309(e), which calls for a hearing upon any application for a license which presents a substantial and material question of fact. We believe Port Angeles' argument is unpersuasive. Dealing with precisely the

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13/ We recognize, however, that Judge Ely has taken a contrary position in his concurrence in Southwestern Cable Co., supra.

same argument that petitioners make here, the Tenth Circuit stated in Conley Electronics Corp. v. U.S. and F.C.C., ___ F.2d ___ (10th Cir., decided April 22, 1968): "The short answer is that [petitioner], by its own admission, is neither an applicant for a license nor a licensee. It is clear, therefore, that the various statutory provisions relied upon are inapplicable by their own terms." Slip Op. pp. 9-10.

Furthermore, the law is quite clear that aside from the statutory hearing rights asserted, Port Angeles is not automatically entitled to a hearing on its request for exemption from an across the board rule, and this is equally true of licensees requesting waivers under the licensing provisions of the Communications Act.[14/] Similar claims by CATV systems have been rejected recently in two different circuits.

In Wheeling Antenna Cable Co. v. U.S. and F.C.C., ___ F.2d ___ (4th Cir., February 28, 1968), the Court rejected a CATV system's complaint of the Commission's denial of a hearing on a waiver request:

> At its option the Commission may, as it did here, adjudicate by reference to a pertinent general rule. Cf. Securities Comm'n v. Chenery Corp., 332 US 194, 203 (1947). In the present circumstances no hearing was demandable. FPC v. Texaco, Inc., 377 US 33, 44 (1964); United States v. Storer Broadcasting Co., 351 US 192, 205 (1956). Otherwise, the Commission would be intolerably and impractically embroiled in a multiplicity of trials. This does not mean, of course, that a petitioner goes unheard. It means only that a Commission may

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14/ See United States v. Storer Broadcasting Co., supra; Cf. WBEN, Inc. v. U.S. and F.C.C. (2nd Cir., ___ F.2d ___, decided May 10, 1968), Slip Op., pp. 2246-2247.

> make its judgment on the petitioner's papers. The decision then becomes reviewable in whatever manner the statute may permit.

And in Conley Electronics Corporation v. U.S. and F.C.C., supra, the Court, rejecting an argument virtually on all fours with that of Port Angeles here, quoted the following language from Airline Pilots Assn., Int'l v. Quesada, 276 F.2d 892 (2nd Cir., 1960):

> "Nor does the regulation violate due process because it modifies pilots' rights without affording each certificate holder a hearing. Administrative regulations often limit in the public interest the use that persons may make of their property without affording each one affected an opportunity to present evidence upon the fairness of the regulation. See United States v. Storer Broadcasting Co., supra; Bowles v. Willingham, 1944, 321 U.S. 502, 519-520 * * *. Obviously, unless the incidential limitations upon the use of airmen's certificates were subject to modification by general rules, the conduct of the Administrator's business would be subject to intolerable burdens which might well render it impossible for him effectively to discharge his duties. All changes in certificates would be subject to adjudicative hearings, including appeals to the courts, and each pilot whose license was affected--here some 18,000--might demand to be heard individually. * * * All private property and privileges are held subject to limitations that may reasonably be imposed upon them in the public interest." Id. at 896. Conley Electronics, supra, Slip Op., pp. 13-14.

The restrictions to which Port Angeles is now subject were imposed after a rulemaking proceeding in which all the legal and policy issues were fully explored. Petitioner had every procedural opportunity to which it is entitled to participate in that rule making, and did so through its participation in a trade association which filed comments with the Commission. If the rules are free of substantive and procedural infirmity, their application

to Port Angeles, and the consequent economic burden on it, does not amount to a deprivation of property under the Fifth Amendment to the Constitution notwithstanding the absence of an individual adjudicatory hearing. Bi-Metallic Investment Co. v. State Board of Equalization, 239 U.S. 441, 445 (1915); California Citizens Band Assoc. v. U.S. and F.C.C., 375 F.2d 43 (9th Cir., 1967), cert. denied, 389 U.S. 844; American Airlines v. C.A.B., 359 F.2d 624 (D.C. Cir., 1966), cert. denied, 385 U.S. 834; Superior Oil Co. v. Federal Power Commission, 322 F.2d 601 (9th Cir., 1965); Willapoint Oysters v. Ewing, 174 F.2d 676 (9th Cir., 1949), cert. denied, 338 U.S. 860.

Finally, we emphasize that the effect on Port Angeles is minimal: it must delete one, and as the record suggests, on occasion two, of the eight signals which it currently carries on its cable. The public will not be deprived of a single program since the only effect of the rule is to avoid duplication of the very same programming on two channels within a 24 hour period. Any locally produced Seattle programming may be carried by Port Angeles as it will not duplicate KVOS-TV programming of a local (Bellingham) or network origin.

V. THE NON-DUPLICATION RULE IS NON-DISCRIMINATORY AND CONTRAVENES NO OTHER CONGRESSIONAL POLICY.

Port Angeles argues (Br., pp. 58-60) that the non-duplication rule in effect discriminates against CATV subscribers since the duplicating signals of KIRO-TV and KING-TV, in Seattle, are available off the air in Port Angeles, whereas they would not be available to subscribers on the cable because subscribers generally remove their roof top antennas when they are hooked up to the cable system. Port Angeles also notes that KIRO-TV operates a translator station in Port Angeles, which rebroadcasts the KIRO signals.[15/]

We think it plain there is no discrimination. Switching equipment is readily available which permits cable subscribers to retain their own private antennas, and to switch to that mode of reception if they wish. Furthermore, the KIRO-TV translator in Port Angeles operates on a UHF channel, and consequently poses very little threat to VHF station KVOS-TV. The cable, however, when installed in a home, provides KIRO signals of better than off-the-air strength which are receivable on all television receivers, and consequently poses a much more substantial threat to KVOS-TV.[16/] In any event, the suggestion that CATV subscribers

15/ A translator is an auxiliary installation usually used to boost a distant television signal in a limited area, and to present it off the air on a channel different from that on which the signal is initially broadcast.

16/ In the Second Report and Order, at 2 F.C.C. 2d 759, the Commission considered the question of translators and nonduplication, and determined that UHF translators, such as that involved here, should not be subject to nonduplication requirements because of the disparity in the likely impact. However, the entire subject of translator duplication is now before the Commission. Notice of Proposed Rule Making, FCC 67-706, June 14, 1967.

are seriously injured by the denial of the opportunity to see the very same programming from a Seattle station which is available on the cable from a Bellingham station, is hard to credit.

Port Angeles also contends (Br., pp. 60-61) that the incidental loss of Seattle originated advertising in those portions of the Seattle programming which must be deleted amounts to a violation of the antitrust laws, specifically 15 U.S.C. sections 1 and 2, and the Commission's own policies. Port Angeles has totally failed to demonstrate that this is so, and, in view of all the foregoing it is patently a trivial argument. Nor is the fact that the rule is operative only upon request of the local broadcaster of any significance. The fact is that the Commission's determination to permit the operation of the non-duplication rule to turn on a request for the protection by the local station involved represents a deference to private arrangements between broadcasters and CATV operators. In effect, the rule as currently written is less harsh than it would be if operation of the rule were entirely automatic. Petitioner's complaints on this score are thus unpersuasive.

Port Angeles also appears to argue that copyright considerations should preclude the CATV's adherence to the rules. However, as the only question presented by the present case is whether the system is required to delete certain programming, we are at a loss to understand the thrust of petitioner's argument. Petitioner does correctly state that the Commission

may in the future modify its rules in light of the Supreme Court's consideration of the copyright issue in the pending litigation.[17/] Until and unless they are modified, however, Port Angeles is bound by them in their present form.

CONCLUSION

For all the foregoing reasons the action below should be affirmed.

Respectfully submitted,

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17/ United Artists Television, Inc. v. Fortnightly Corporation, 377 F.2d 872 (2nd Cir., 1967), Fortnightly Corporation v. United Artists Television, Inc. on certiorari before the Supreme Court (Case No. 618), October Term, 1968.

§ 74.1103 Requirement relating to distribution of television signals by community antenna television systems.

No community antenna television system shall supply to its subscribers signals broadcast by one or more television stations, except in accordance with the following conditions:

(a) *Stations required to be carried.* Within the limits of its channel capacity, any such CATV system shall carry the signals of operating or subsequently authorized and operating television broadcast and 100 watts or higher power translator stations in the following order of priority, upon the request of the licensee or permittee of the relevant station:

(1) First, all commercial and noncommercial educational stations within whose principal community contours the system or the community of the system is located, in whole or in part;

(2) Second, all commercial and noncommercial educational stations within whose Grade A contours the system or the community of the system is located, in whole or in part;

(3) Third, all commercial and noncommercial educational stations within whose Grade B contours the system or the community of the system is located, in whole or in part; and

(4) Fourth, all commercial and noncommercial educational translator stations operating in the community of the system, in whole or in part, with 100 watts or higher power.

(b) *Exceptions.* Nothwithstanding the requirements of paragraph (a) of this section,

(1) The system need not carry the signal of any station, if (i) that station's network programing is substantially duplicated by one or more stations of higher priority, and (ii) carrying it would, because of limited channel capacity, prevent the system from carrying the signal of an independent commercial station or a noncommercial educational station.

(2) In cases where (i) there are two or more signals of equal priority which substantially duplicate each other, and (ii) carrying all such signals would, because of limited channel capacity, prevent the system from carrying the signal of an independent commercial station or a noncommercial educational station, the system need not carry all such substantially duplicat-

ing signals, but may select among them to the extent necessary to preserve its ability to carry the signals of independent commercial or noncommercial educational stations.

(3) The system need not carry the signal of any television translator station if: (i) The system is carrying the signal of the originating station, or (ii) the system is within the Grade B or higher priority contour of a station carried on the system whose programing is substantially duplicated by the translator; *Provided, however,* That where the originating station is carried in place of the translator station, the priority for purposes of paragraph (e) of this section shall be that of the translator station unless the priority of the originating station is higher.

(4) In the event that the system operates, or its community is located, within the Grade B or higher priority contours of both a satellite and its parent station, the system need carry only the station with the higher priority, if the satellite station and its parent station are of equal priority, the system may select between them.

(c) *Special requirements in the event of noncarriage.* Where the system does not carry the signals of one or more stations within whose Grade B or higher priority contour it operates, or the signals of one or more 100 watts or higher power translator stations located in its community, the system shall offer and maintain, for each subscriber, an adequate switching device to allow the subscriber to choose between cable and noncable reception, unless the subscriber affirmatively indicates in writing that he does not desire this device.

(d) *Manner of carriage.* Where the signal of any station is required to be carried under this section,

(1) The signal shall be carried without material degradation in quality (within the limitations imposed by the technical state of the art);

(2) The signal shall, upon request of the station licensee or permittee, be carried on the system on the channel on which the station is transmitting (where practicable without material degradation); and

(3) The signal shall, upon the request of the station licensee or permittee, be carried on the system on no more than one channel.

(e) *Stations entitled to program exclusivity.* Any such system which operates, in whole or in part, within the Grade B or higher priority contour of any commercial or noncommercial educational television station or within the community of a fourth priority television translator station, and which carries the signal of such station shall, upon request of the station licensee or permittee, maintain the station's exclusivity as a program outlet against lower priority or more distant duplicating signals, but not against signals of equal priority, in the manner and to the extent specified in paragraphs (f) and (g) of this section.

(f) *Program exclusivity; extent of protection.* Where a station is entitled to program exclusivity, the CATV system shall, upon the request of the station licensee or permittee, refrain from duplicating any program broadcast by such station, on the same day as its broadcast by the station, if the CATV operator has received notification from the requesting station of the date and time of its broadcast of the program and the date and time of any broadcast to be deleted, as soon as possible and in any event no later than 48 hours prior to the broadcast to be deleted. Upon request of the CATV system, such notice shall be given at least 8 days prior to the date of any broadcast to be deleted.

(g) *Exceptions.* Notwithstanding the requirements of paragraph (f) of this section.

(1) The CATV system need not delete reception of a network program if, in so doing, it would leave available for reception by subscribers, at any time, less than the programs of two networks (including those broadcast by any stations whose signals are being carried and whose program exclusivity is being protected pursuant to the requirements of this section);

(2) The system need not delete reception of a network program which is scheduled by the network between the hours of 6 and 11 p.m., eastern time, but is broadcast by the station requesting deletion, in whole or in part, outside of the period which would normally be considered prime time for network programing in the time zone involved;

(3) The system need not delete reception of any program consisting of the broadcast coverage of a speech or other event as to which the time of presentation is of special significance, except where the program is being simultaneously broadcast by a station entitled to program exclusivity; and

(4) The system need not delete reception of any program which would be carried on the system in color but will be broadcast in black and white by the station requesting deletion.

[*§ 74.1103(a) and (b)(3) amended, (b)(4) adopted eff. 2-28-67; III(64)-16*]

CERTIFICATE

I certify that, in connection with the preparation of this brief, I have examined Rules 18, 19 and 39 of the United States Court of Appeals for the Ninth Circuit, and that, in my opinion, the foregoing brief is in full compliance with those rules.

/s/ William L. Fishman

No. 22,630

IN THE

United States Court of Appeals

For the Ninth Circuit

JONES STEVEDORING COMPANY,
a corporation,
Appellant,

vs.

NIPPO KISEN COMPANY, LTD.,
a corporation,
Appellee.

NIPPO KISEN COMPANY, LTD.,
a corporation,
Appellant,

vs.

STOCKTON BULK TERMINAL COMPANY OF CALIFORNIA, INC., a corporation,
Appellee.

On Appeal from the United States District Court for the Northern District of California

Honorable Lloyd H. Burke, District Court Judge

OPENING BRIEF FOR APPELLANT

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PERNAU-WALSH PRINTING CO., SAN FRANCISCO

Subject Index

Table of Authorities Cited

Codes

Rules

No. 22,630

IN THE

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OPENING BRIEF FOR APPELLANT

JURISDICTIONAL STATEMENT

This is an appeal from findings of facts, conclusions of law, and judgment rendered in favor of appellee,

Nippo Kisen Co., Ltd., and against appellant, Jones Stevedoring Company.

The action was commenced by the filing of a complaint in admiralty (R. 1) alleging that the plaintiff, Joseph F. Mastro, a longshoreman, was injured aboard the SS HOKYO MARU, a vessel owned and operated by defendant and appellee, Nippo Kisen Co., Ltd. (served as Doe I), which vessel was then berthed in navigable waters of the United States at the port of Stockton, California. The complaint sought damages for personal injuries caused by the unseaworthiness of the vessel and the negligence of the defendant.

The action was based upon the General Maritime Law, and the District Court had jurisdiction by virtue of 28 U.S.C. section 1333 (admiralty jurisdiction).

After answering the complaint, Nippo Kisen Co., Ltd. filed an impleading petition (R. 15) against third-party defendant and appellant Jones Stevedoring Company, as well as against third-party defendant and appellee Stockton Bulk Terminal Company of California, Inc. for indemnity with regard to any payment to Mastro by way of judgment or settlement, and in addition, attorney's fee and costs of defense of his action.

Although originally filed as a civil action, the matter was transferred to the admiralty docket by stipulation. (R. 20.) Other parties and pleadings were dismissed prior to trial and are of no concern here.

The case was tried in two portions. In March of 1965, evidence was heard relating mainly to issues

of liability and damages between Mastro and Nippo Kisen Co., Ltd., although some evidence bearing upon indemnity was taken. The Honorable Lloyd H. Burke, sitting in admiralty, made certain findings of fact and conclusions of law to the effect that the sole cause of the accident was the negligence of Mastro, himself. He found no negligence on the part of the defendant, and no unseaworthiness of its vessel. (R. 108-114.)

The remainder of the case was then heard in May of 1967, and Judge Burke made the following finding of fact which is disputed on appeal:

> "1. Plaintiff, Joseph F. Mastro, was at all material times employed as a longshoreman by Jones Stevedoring Co., and not by Stockton Bulk Terminal Company of California, Inc." (R. 139.)

The court made the following conclusions of law, which are disputed on appeal:

> "1. Mastro's failure to exercise reasonable care and caution in the course and scope of his employment by Jones Stevedoring Co., constitutes a breach of Jones Stevedoring Co.'s warranty to perform their work in a safe, proper and workmanlike manner."

> "3. Third-Party Plaintiff (Nippo Kisen Co., Ltd.) is entitled to a decree in its favor against Third-Party Defendant, Jones Stevedoring Co., in the amount of $7,132.90, with court costs and interest from March 4, 1966." (R. 139.)

Simply stated, the question in the indemnity case as presented to the trial court, was which of the two third-party defendants, Jones Stevedoring Co. or

Stockton Bulk Terminal Company of California, Inc., should be required to indemnify the shipowner. The decision went against Jones, and this appeal resulted.

The final judgment, from which this appeal is taken, was entered on October 30, 1967. (R. 140-141.)

This court has jurisdiction by virtue of 28 U.S.C. section 1291 (appeal from a final decision of the District Court), invoked by timely Notice of Appeal filed November 21, 1967. (R. 142.)

STATEMENT OF THE CASE

1. The Accident

Mastro, a longshoreman, was aboard appellee Nippo Kisen's vessel, the HOKYO MARU, to assist in loading it with bulk iron ore. The loading of the cargo was done by means of specialized equipment at Stockton Bulk's ore loading dock at Stockton. The ore was brought to the dock in railroad cars, and stockpiled on the dock. It was then placed on a system of conveyors which took the ore from ground level up to a tower, where it was dropped through a loading spout suspended from the tower and directed into the hold of the ship. The loading spout had to be moved from place to place in the hatch to load it evenly by means of blocks, wire cable, and the ship's winches. While attempting to move one of the blocks so as to change the position of the loading spout, Mastro allowed his hand to come in contact with a moving cable, which pulled his hand into a block, injuring him. Respondent's Revised Proposed Findings of Fact and Con-

clusions of Law Between Libelant and Respondent. (R. 110-113.) These facts are not disputed, and Mastro is not a party to this appeal.

2. Indemnity

It was not disputed at the trial that the shipowner, Nippo Kisen Co., Ltd., was entitled to indemnity from either Jones Stevedoring Co., or Stockton Bulk Terminal Company of California, Inc., nor was the amount of attorney's fee and defense costs contested. The question, simply stated, as presented to the District Court, was which of the two third-party defendants should be required to indemnify the shipowner.

There was no direct contract of any sort between Jones and Nippo Kisen, or between Stockton Bulk and Nippo Kisen. The vessel owner orally contracted with Stockton Port District (a municipal corporation) for the loading of its ship. The port in turn orally contracted with Stockton Bulk, whereby Stockton Bulk undertook to do all the stevedoring work on the vessel. Pre-trial statement of Nippo Kisen. (R. 89-90.)

Stockton Bulk in turn had an oral arrangement with Jones whereby Jones would perform certain payroll and clerical work for Stockton Bulk in connection with Stockton Bulk's activities in loading the vessel. As contemplated by this arrangement, and as carried out in practice, Stockton Bulk had supervision and control of all of the operations involved in loading the ship. Jones performed merely the paper-

work involved in processing the payrolls for the longshoremen. (Tr. 215-216.)

Therefore, Jones was only a payroll agent; that was its contention at trial and remains its contention on appeal. Stockton Bulk is the proper party to indemnify the shipowner, since that company had supervision and control of all longshore employees aboard the vessel, including Mastro. Stockton owed a warranty of workmanlike service to the vessel, but Jones owed no such warranty. Futhermore, it is the contention here, as it was in the court below, that Stockton Bulk and not Jones, was Mastro's employer, in light of the arrangement between Jones and Stockton Bulk.

Evidence was presented on these issues, and Jones requested that detailed findings be made as to all of the underlying facts. (R. 132-137.) However, the judge refused to particularize, concluding simply that Mastro was Jones' employee. (R. 139.)

SPECIFICATIONS OF ERROR

1. The District Court erred in holding that Jones Stevedoring Company owed a warranty of workmanlike service to Nippo Kisen Co., Ltd., under the law and the evidence of the case. (R. 139.)

2. The District Court erred in finding that Mastro was employed as a longshoreman by Jones Stevedoring Company and not by Stockton Bulk Terminal Company of California, Inc. (R. 139.) This finding is clearly erroneous, and is not supported by substantial

evidence. Also, this is a conclusion of law, rather than a finding of fact. The findings of fact as made were inadequate.

3. The District Court erred in holding that Mastro's own negligence constituted a breach of a warranty owed to Nippon Kisen Co., Ltd., by Jones Stevedoring Company to perform their work in a safe, proper and workmanlike manner. (R. 139.)

4. The court erred in awarding pre-judgment interest.

SUMMARY OF ARGUMENT

1. Jones Owed No Warranty

(a) The shipowner's right of indemnity arises from the contractual relationship between it and the company performing the ship-loading operation. The warranty arises for two reasons:

(1) The ship-loading contractor (normally called the stevedore) holds itself out as an expert in its field, and the shipowner relies on that holding out;

(2) The contractor is in a better position than the shipowner to prevent accidents occurring as the result of defects in its own equipment or human failures on the part of the men performing its work.

(b) The evidence clearly showed that Stockton Bulk was the contractor for the loading of the ship, that it had direction and control of the facilities, equipment, and method of loading the ship, and su-

pervision and control of the longshoremen. Jones, on the other hand, merely had a contract for the performance of certain payroll and other clerical services for Stockton Bulk in connection with its ship-loading operations; Jones had nothing to do with the work being done.

(c) Therefore, Stockton Bulk met both of the requirements for the imposition of the warranty of workmanlike service, and Jones Stevedoring Company met neither. Accordingly, it was error to hold that Jones owed Nippo Kisen a warranty to perform any stevedoring services in a workmanlike manner and to require Jones to indemnify Nippo Kisen. Stockton Bulk, rather than Jones, should be held liable in indemnity.

2. Mastro Was Not Jones' Employee

(a) The finding of fact which held that Mastro was an employee of Jones should have been labeled a conclusion of law, since the determination of employment requires the application of a legal standard to a number of underlying facts. The Court of Appeals is not bound by the legal conclusion made by the District Court, but should make its own determination on the undisputed facts that Mastro was the employee of Stockton Bulk, not Jones. The inadequacy of the findings should not deter the appellate court from making this determination, in view of the complete record and uncontradicted evidence.

(b) Even if properly labeled, the finding that Mastro was the employee of Jones is clearly erroneous

and not supported by substantial evidence. The overwhelming weight of the evidence at the trial was that all of the factors from which the employment relationship should be determined indicated that Stockton Bulk, rather than Jones, should have been held to be Mastro's employer. Stockton Bulk, not Jones, had exercised the right of supervision and control of Mastro's work, furnished the money to pay him his wages, and received the benefit of his efforts. The contractual arrangement between Jones and Stockton Bulk confirmed that Mastro was the employee of Stockton Bulk.

3. Mastro's Negligence Was Stockton Bulk's Breach

Even if it is accepted that Mastro was Jones' employee, Stockton Bulk agreed to assume the supervision and control of the men hired from the union hall, and Stockton Bulk, rather than Jones, should be held responsible for Mastro's negligence, as a breach of its warranty.

4. The Court Erred in Awarding Pre-Judgment Interest

It was error and an abuse of the trial court's discretion to award pre-judgment interest, since the delay was admittedly and intentionally caused by the shipowner.

ARGUMENT

1. JONES OWED NO WARRANTY

The District Court erred in holding that Jones Stevedoring Company was required to indemnify Nippo Kisen Company, Ltd. Implicit in this holding,

found in conclusions of law one and three (R. 139), is the necessary holding that Jones Stevedoring Company in fact owed a warranty of workmanlike service to the shipowner. It is here contended that Jones owed no such warranty. The only warranty owed was that of Stockton Bulk. In order to determine which of these two companies, Stockton Bulk or Jones, should indemnify the shipowner, it is first necessary to determine the basis for the shipowner's right of indemnity.

(a) The Basis for Indemnity

The current law of indemnity in admiralty cases stems from *Ryan Stevedoring Co. v. Pan-Atlantic SS Corp.,* 350 U.S. 124, 76 S.Ct. 232, 100 L.ed. 133 (1956). From that case, it is clear that the right of indemnity is a contractual right, although later cases show that actual privity of contract is not required. *Crumady v. The "JOACHIM HENDRIK FISSER",* 358 U.S. 423, 79 S.Ct. 445, 3 L.ed.2d 413 (1959), and cases following. It is, however, contractual in that it arises from a consensual relationship, whether the contractor agrees directly with the shipowner or through an intermediary. It is this relationship that gives rise to the duty. *Ryan, supra.*

From the cases cited below, it is seen that there are two reasons for the implied warranty of workmanlike service. First, the company selected to perform the loading or discharging operations is chosen because of its expertise in the field, and the shipowner relies on the qualifications of this contracting company in the selection of equipment and method and in the su-

pervision and control of the work. Since the contractor holds itself out to be an expert in cargo-handling, and since it is in control of the operation, the courts have read into the relationship an obligation to perform the work safely and in a workmanlike manner.

In addition, the courts assign a policy reason. The contractor, it is held, is in a better position than the shipowner to prevent accidents occurring as the result of defects in its own equipment or human failures on the part of the men doing the work. Since the shipowner is held liable to the injured workman in the strict liability of unseaworthiness, it is only fair, the courts say, to allow the shipowner to look to the contractor for indemnity in those circumstances where the contractor was in fact in a better position to minimize the risks involved.

Upon this basis, indemnity in this case should fall upon Stockton Bulk, not Jones. The evidence clearly showed that Stockton Bulk was the expert in the field of loading ships with bulk ore, that it held itself out as such an expert, and that the shipowners relied on its expertise. Further, Stockton Bulk had the entire supervision and control of the facilities, equipment, method, and details of all of the work involved in loading the ship. Stockton Bulk, therefore, was in the best position to minimize the risks of injury.

In discussing the nature of the warranty arising from the contractual relationship, the court in *Ryan, supra,* stated that the agreement to load or discharge cargo

> ". . . necessarily includes (the contractor's) . . . obligation not only to stow the (cargo) . . . but to stow (it) . . . properly and safely. Competency and safety of stowage are inescapable elements of the service undertaken. This obligation is not a quasi-contractual obligation implied in law or arising out of a noncontractual relationship. It is of the essence of (the contractor's) . . . stevedoring contract. It is (the contractor's) . . . warranty of workmanlike service that is comparable to a manufacturer's warranty of the soundness of its manufactured product. The shipowner's action is not changed from one for a breach of contract to one for a tort simply because recovery may turn upon the standard of the performance of (the contractor's) . . . stevedoring service." 350 U.S. at 133-134, 100 L.ed. at 142.

The reason for the rule of indemnity was even further elucidated in *Drago v. A/S Inger,* 194 F. Supp. 398 (E.D.N.Y. 1961). There, the shipowner sought to recover indemnity from the charterer as well as from the discharging stevedore. The charter required the charterer to discharge the cargo, but a consignee of certain cargo had engaged an independent stevedoring company to do so. The shipowner joined the time-charterer, seeking indemnity from it as well as from the stevedoring company, arguing that since the charter party obligated the charterer to discharge the vessel, that there was implied in the charter a promise that the unloading would be done safely, and that a breach of this warranty entitled the ship to indemnity as against the charterer. As to the charterer's liability, the district court stated:

> "The stevedore's warranty arises because it holds itself out to do a job; that it is proficient in its work which, being done aboard a ship, is necessarily fraught with danger and therefore requires a degree of expertise. The charterer, on the other hand, makes no representation that it is either an expert seaman or an expert stevedore. Workmanlike service and reasonable safety on the part of the charterer are not the 'essence' of the charter as they are of the stevedoring contract." 194 F.Supp. at 410.

The stevedore was held liable, and the charterer was discharged. This issue was not before the court on appeal. 305 F.2d 139 (2d Cir. 1962).

This reasoning is underscored by the case of *Matson Navigation Co. v. United States,* 173 F.Supp. 562 (N.D. Cal. 1959). The United States

> "did not offer its services to Matson as a professional stevedore. It merely contracted to assume the responsibility for the removal of its own cargo from Matson's vessel. This is too flimsy a predicate for a warranty of professional competence from which could be implied a contractual obligation to indemnify Matson for any damages it might be required to pay another as the result of improper handling by the United States of its cargo." 173 F.Supp. at 564.

A different result was obtained in *Rogers v. United States Lines,* 303 F.2d 295 (3d Cir. 1962), on facts sufficiently different to warrant the different result, and this further illustrates the basis for indemnity. There, the vessel's only contract was with

the consignee of the cargo, which company agreed to arrange for the discharge of its cargo to its subsidiary, a stevedore company. The vessel owner obtained indemnity from the consignee, because it entered into a contractual undertaking to perform with reasonable safety when it agreed to accept the responsibility for the unloading of its cargo. The *Matson* case was not cited, and there is no discussion as to expertise. There was evidence that the consignee actually directed the manner and method of the discharge, notified the shipowner where it wanted the vessel, arranged for berth, and for railroad cars to receive the cargo. There was an on-going informal practice in so doing.

The corollary of this reason for the indemnity right is that discussed in *Italia Societa v. Oregon Stevedoring Co.,* 376 U.S. 315, 84 S.Ct. 748, 11 L.ed. 2d 732 (1964), and *DeGioia v. United States Lines,* 304 F.2d 421 (2d Cir. 1962). This reason is that the contractor is in a better position to minimize the risks of injury to the men working cargo, since it has supervision and control of the men, equipment, and methods of operation.

In *Italia Societa,* the contractor was a specialist in stevedoring, and was obligated under its contract with the ship to discharge the vessel, supply the necessary equipment, and supervise the operation. The court had this to say:

> "Although none of these factors affect the shipowner's primary liability to the injured employee of Oregon, since its duty to supply a seaworthy vessel is strict and nondelegable, and ex-

> tends to those who perform the unloading and loading portion of the ship's work (citing cases) . . . they demonstrate that Oregon was in a far better position than the shipowner to avoid the accident. The shipowner defers to the qualification of the stevedore contractor in the selection and use of equipment and relies on the competency of the stevedore company." (Citing cases.) 376 U.S. at 322-323, 11 L.ed.2d at 740.

In *Italia Societa,* the cause of the accident was a latent defect in the equipment brought aboard the vessel by the contractor. However, it is obvious that the same considerations apply where the cause of the accident, as in the present case, is negligence of one of the men employed in the discharging operations. In the case of the contractor's equipment, the contractor "which brings its gear aboard knows the history of its prior use and is in a position to establish retirement schedules and periodic retests so as to discover defects and thereby insure safety of operations." 376 U.S. at 323, 11 L.ed. 2d at 740. Where the worker is at fault, the contractor is in a position to instruct and supervise, although the shipowner is not.

Similarly, in *DeGioia, supra,* the basis of the indemnity right was discussed.

> "The primary source of the shipowner's right to indemnity, as a practical matter, is his nondelegable duty to provide a seaworthy ship, by virtue of which he may be held vicariously liable for injuries caused by hazards which the longshoremen either created or had the primary responsibility or opportunity to eliminate or avoid.

> (citation). The function of the doctrine of unseaworthiness and the corollary doctrine of indemnification is allocation of the losses caused by shipboard injuries to the enterprise, and within the several segments of the enterprise, to the institution or institutions most able to minimize the particular risk involved." 304 F.2d at 425-426.

Similar considerations were involved in *Booth SS Co. v. Meier & Oelhaf Co.,* 262 F.2d 310 (2d Cir. 1958). There, the contractor involved was a company providing engine repair work, and the question was whether the oral agreement between the contractor and the shipowner gave rise to an implied warranty of workmanlike service. The court held that it did, citing both grounds mentioned above, that the shipowner relies on the expertise, supervision, and control of the contractor, and the contractor is in a better position to minimize the risks.

This court recently had occasion to examine the nature of and reason for the implied warranty of workmanlike service. *H & H Ship Service Co. v. Weyerhaeuser Line,* 382 F.2d 711 (9th Cir. 1967). There, the contractor, a ship repair company, argued that the warranty of workmanlike service did not arise under the circumstances. The court stated:

> "Contrary to what appellant tells us, the circumstances of this case relating to control, supervision and expertise do not suggest that a warranty of workmanlike service did not arise. . . . If 'liability should fall upon the party best situated to adopt preventive measures and thereby

> reduce the likelihood of injury,' Italia Societa, etc. v. Oregon Stevedoring Co., supra, 376 U.S. at 324, 84 S.Ct. at 754, the circumstances of this case require that the warranty of workmanlike service be recognized here." (382 F.2d at 713.

Similarly, in *Matson Terminals, Inc. v. Caldwell,* 354 F.2d 681 (9th Cir. 1965), this court had another occasion to examine the basis for indemnity. Quoting at length from the Supreme Court's opinion in *Italia Societa, supra,* the court noted that expertise of a contractor was the basis for the implied warranty.

(b) The Evidence in the Case

Since the shipowner's admitted right to indemnity is based upon the contractual relationship between it and the shiploading contractor, it is necessary to examine in some detail the contractual arrangements in this case, in order to determine which of the two third-party defendants is in fact the shiploading contractor who warranted that the work aboard the vessel would be done in a workmanlike manner.

The basic agreement to load the vessel was made by Stockton Bulk. That company undertook to load the vessel, which undertaking included its use of its own facilities, its supervision and control of the operation, with the use of workers obtained by it from the union hall, with Jones providing payroll services and nominal contact with the Pacific Maritime Association.

A. W. Gatov, president of Stockton Bulk, testified as follows in his deposition, which was admitted into evidence (Tr. 246):

> "(T)he only function of the Stockton Bulk Terminal Company was to unload rail cars of bulk mineral materials to stockpile them and to subsequently *load that material to ships.*" (Gatov deposition, page 6, lines 22 to 24; emphasis supplied.)
>
> *"We were the contractors for loading this material for the account of the Port of Stockton."* (Gatov deposition, page 16, lines 7 to 8; emphasis supplied.)

The Port of Stockton solicited business for the port, and Stockton Bulk "negotiated with the port of Stockton to load this material at a fixed rate per long ton." (Gatov deposition, page 16, line 25 to page 17, line 1.)

R. W. Danska, Jones' office manager, testified at the trial to the oral arrangement between Stockton Bulk and Jones which he negotiated on behalf of Jones. No written contract resulted from these negotiations; the parties operated under an oral agreement. (Tr. 214.) Stockton Bulk, having obtained the contract to load bulk ore on vessels in the Port of Stockton, solicited Jones' services for handling the payroll. (Tr. 215.) The understanding between Jones and Stockton Bulk was that Jones was to have nothing to do with the operations at the ore dock, but that Stockton Bulk was to provide all supervision and control of the men ordered from the hall, and to manage the operation in all ways. Jones was merely to handle the payroll processing only. (Tr. 215, 216, 227-229.)

This agreement was carried out in practice as contemplated. Stockton Bulk was the lessee and operator of the specialized loading facilities used in loading ships with bulk ore, including the conveyors, the tower, the loading spout, the pier, etc. (Tr. 236-237.) Stockton bulk owned the very block in which Mastro's hand was injured, and the wire pendant which held the block. (Tr. 241.)

All supervision and control of the entire operation was carried out by Stockton Bulk. (Tr. 216.) On-the-job supervision was carried out by Leo Goodwin, manager of Stockton Bulk, and Charles F. Cook, Stockton Bulk's superintendent. (Tr. 235, 241.) Goodwin's duties consisted of "Running the plant and its general supervision, maintenance, upkeep." (Tr. 236.) Goodwin was in charge of the ore dock, and if any orders were to be given, they were given by him or his assistant, Cook. (Tr. 96.) If anything was found to be wrong with the gear or equipment, the longshoremen would call it to the attention of the walking boss, and the walking boss would either see the vessel's mate or the permanent supervisory employees of Stockton Bulk: Goodwin or Cook. (Deposition of Charles Cook, page 21, lines 1 to 6; in evidence, Tr. 234-235.)

The manager or the superintendent would be on the dock to assist in spotting the ship when it first arrived, in cooperation with the vessel's mate. Thereafter, the superintendent would delegate authority to the walking boss to move the loading operations from hatch to hatch as necessary, and in general as to how

the work of loading the ship would be done. (Tr. 243-244; Cook deposition, page 37, line 4 to page 38, line 4.)

Thus, the chain of command on the job would begin at the executive level of Stockton Bulk, then to Goodwin and Cook, and then to the walking boss, who conveyed the orders directly to the longshoremen on the ship and on the dock. (Tr. 96-97; 119-120.)

The longshoremen, including the gang bosses and walking bosses, were obtained from the union dispatching halls of the International Longshoremen's and Warehousemen's Union. When a vessel was due to arrive for taking on a cargo of bulk ore, Stockton Bulk would call the union halls and order the necessary men. (Tr. 95-96; 217; 242-243.) Longshoremen, including gang bosses, were taken as dispatched. However, Stockton Bulk utilized the customary system in Stockton of hiring the walking bosses on a preferred basis. (Tr. 225-227.) On the day of the accident, Mastro was dispatched as a gang boss. (Tr. 22.)

Cook or Goodwin were the persons concerned with reporting any accidents occurring in connection with Stockton Bulk's loading operations. In fact, Goodwin, manager of Stockton Bulk, made up the accident report for Mastro's injury. (Tr. 238-240.) Cook also went aboard the HOKYO MARU in his capacity of superintendent, to investigate the accident. (Cook deposition, page 11.)

On the other hand, Jones had nothing to do with the ship-loading operations at the ore dock. (Tr. 216.)

No Jones superintendents or other permanently employed supervisory personnel were ever down on the ore dock participating or supervising the loading operation. (Tr. 122; 220-222; 224-226.) No contact was made with Jones with regard to any particular vessel that came in for loading, other than the payroll documents that were sent to Jones. The gang lists (reports of time worked) were made out by the walking boss or gang boss aboard the ship, and turned into the office of Stockton Bulk. Stockton Bulk then transmitted this payroll data to Jones for processing. (Tr. 227, 233-234.) The only thing that Jones did was to receive the payrolls, process them through PMA for payment to the longshoremen, and bill Stockton Bulk for the amount expended, plus its service charge. (Tr. 215-216; 218; 223-224; 227-228; 234.)

The arrangement between Jones and Stockton Bulk, whereby Jones was to process the payroll, was simply a convenience to Stockton Bulk, who was not a member of PMA. (Tr. 244.)

(c) The Law As Applied to the Evidence in This Case

Thus, in view of the authorities cited above, Stockton Bulk, not Jones, should be held liable in indemnity to the shipowner. Stockton Bulk, not Jones, was the expert in the specialized field of loading ships with bulk ore. It, not Jones, was holding itself out to Stockton Port District and shipowners that it was qualified as such an expert. Stockton Bulk, not Jones, obtained the basic contract to do the loading of the ships that Stockton Port District

solicited, relying upon the expertise of Stockton Bulk. Stockton Bulk and not Jones had this direct contract with Stockton Port District, and had direct contact with the vessels that it loaded. Stockton Bulk and not Jones was notified of incoming vessels, the amounts and types of cargoes to be loaded, and the relevant times and dates involved. Stockton Bulk and not Jones ordered the men from the union hall, and had complete supervision and control over these men, the methods used, and all of the gear and equipment used in the loading process. Stockton Bulk and not Jones owned or leased, maintained, supplied, and furnished all gear and equipment necessary for the loading operation which was not provided by the ships.

It was Stockton Bulk's undertaking that falls within the purview of *Ryan* and the cases following it. That is the agreement that "necessarily includes (the) . . . obligation not only to stow the (cargo) . . . but to stow (it) . . . properly and safely". *Ryan Stevedoring Co. v. Pan-Atlantic SS Corp., supra,* 350 U.S. at 133, 100 L.ed. at 142. Stockton Bulk's is the expertise referred to in *Drago, supra,* as well as the holding out referred to in that case. Compare Stockton Bulk's situation to that of the United States in *Matson Navigation Co. v. United States, supra,* where the government escaped indemnity liability because it was not in the business of handling cargo. Here, Stockton Bulk's *only* business was loading ships.

Similarly, Stockton Bulk, not Jones, is in the position contemplated in *Italia Societa, supra,* and *De-*

Gioia, supra. Stockton Bulk, not Jones, having full supervision and control as shown above, was in the position of being best able to prevent accidents in the loading operations. Stockton Bulk, not Jones, was, in the words of Judge Clark, that segment of the enterprise "most able to minimize the particular risk involved." *DeGioia v. United States Lines, supra,* 304 F.2d at 426.

As a practical matter, it was Stockton Bulk's men, methods, and machinery that got the job done. That company was in a position to discover defects in its equipment by subjecting it to appropriate tests. That company was familiar with the history of its own equipment and its prior use, and was "in a position to establish retirement schedules and periodic retests so as to discover the defects and thereby insure safety of operations." *Italia Societa v. Oregon Stevedoring Co., supra,* 376 U.S. at 323, 11 L.ed. 2d at 740. Similarly, if any improper method was involved in the loading operations, the remedy lay in the hands of Stockton Bulk.

On the other hand, there is no evidence that Jones undertook to do any stevedoring aboard the vessel. There is no proof that Jones undertook to do or did anything other than paperwork in connection with the processing of payrolls for the convenience of Stockton Bulk, and for payment of a small fee per check written. Although Jones was in the stevedoring business generally in Stockton as well as elsewhere (Tr. 222), it did not act as a stevedore in this situation. It held itself out to no one as an expert in con-

nection with the loading of ships with bulk ore. It had no special claim to expertise, no special facilities or equipment, no exclusive contract to load ships with bulk ore, as Stockton Bulk did. Jones had no control over the men, no control over the methods employed or the equipment used in loading bulk ore. Jones was in no position to take any steps whatsoever to prevent an accident occurring during the loading process. Jones meets none of the requirements for imposition of the warranty of workmanlike service as laid down by the foregoing authorities.

Therefore it was error to require Jones to indemnify the vessel in this case.

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2. MASTRO WAS NOT JONES' EMPLOYEE

(a) A Conclusion of Law and Not a Finding of Fact

Finding of fact number one is as follows: "Plaintiff, Joseph F. Mastro, was at all material times employed as a longshoreman by Jones Stevedoring Co., and not by Stockton Bulk Terminal Company of California, Inc." (R. 139.)

Actually, this kind of determination is a conclusion of law, rather than a finding of fact. Employment of one person by another is a legal relationship, based upon a number of underlying factors. The most important of these factors is the right of the employer to direct and control the details of the work performed by the employee. Thus, the California courts have held that the right to control and direct the activities of the worker, and the manner and method

of work gives rise to the employment relationship. *Miller v. Long Beach Oil Dev. Co.,* 167 Cal.App.2d 546, 334 P.2d 695 (1959); *Eye v. Kafer, Inc.,* 202 Cal. App.2d 449, 20 Cal.Rptr. 841 (1962).

The fact that one is performing work or labor for another is prima facie evidence of the relationship of employment, and such person is presumed to be a servant of the one to whom he is rendering service. *Robinson v. George,* 16 Cal.2d 238, 242, 105 P.2d 914 (1940).

The form of a contract of employment is not controlling, but the courts look rather to the substance of the relationship. *Nichols v. Arthur Murray, Inc.,* 248 Cal.App.2d 610, 56 Cal.Rptr. 728 (1967); *Empire Star Mines Co. v. California Employment Commission,* 28 Cal.2d 33, 168 P.2d 686 (1946).

In *Taft Broadcasting Co. v. Columbus-Dayton Local,* 297 F.2d 149 (6th Cir. 1961), the court was faced with a question very similar to the kind of determination that should have been made in this case. There, a man worked for a radio station as an announcer, and also did a news program on a television station owned by a corporation which was a subsidiary of the corporation which owned the radio station. The union had a collective bargaining agreement with the television station, but not with the radio station. The television station urged that the man was an employee of the radio station and not of the television station, and that therefore the arbitration provisions of the union contract did not apply to the man's discharge from his television duties. Upon stipulated

facts, the trial court found that the union member was not an employee of the television station, and concluded that the dispute was not arbitrable.

On appeal, the court stated that the finding of fact was in reality a conclusion of law, and that therefore the appellate court was free to draw its own legal conclusions and inferences. The court then proceeded to hold that the man was an employee of the television station, even if only a "loaned employee," because he was subject to the direction and control of the television station.

In *Taft,* the trial court concerned itself merely with the form of the relationship, ignoring the substance. The court apparently ignored the fact that the man was performing work for the television station under its direction and control, seizing only upon the formal relationship reflected in the written contracts. Similarly, the trial court in this case seized upon the pro forma relationship and ignored the fact that Mastro was performing work for Stockton Bulk in its business of loading ships, and was working under its supervision and control. It is submitted that this court should follow the appellate decision in *Taft,* and reverse the judgment below.

Although requested to do so, the trial judge refused to make findings of fact on the evidence as to these factors underlying the conclusion that Jones employed Mastro. See Jones' Objections to Findings of Fact and Conclusions of Law and Proposed Modifications and Additions. (R. 132-137.) If such findings had been made, the conclusion would have been inescapable that

Mastro was in fact the employee of Stockton Bulk, rather than of Jones.

If this determination should have been designated a conclusion of law, this court is not bound by the trial court's determination and may determine the matter for itself. *Brown v. Cowden Livestock Co.,* 187 F.2d 1015 (9th Cir. 1951).

The trial court's label as to findings of fact or conclusions of law does not bind the appellate court, which can draw its own legal conclusions and inferences. *Elyria-Lorain Broadcasting Co. v. Lorain Journal Co.,* 298 F.2d 356 (6th Cir. 1961).

It is submitted that the determination of employment was a conclusion of law, and this court is therefore free to draw its own conclusions from the evidence in the case, which is mostly uncontradicted. *Taft Broadcasting Co. v. Columbus-Dayton Local, supra,* 297 F.2d 149 (6th Cir. 1961).

Even if this determination be considered a mixed question of law and fact, it is reviewable on appeal as a conclusion of law, not as a finding of fact. Again, this court would not then be bound by the determination made below, or by the "clearly erroneous" rule. *Official Creditors' Committee v. Ely,* 337 F.2d 461 (9th Cir. 1964).

The reason for the clearly erroneous rule is that generally the trial court is in a better position to evaluate the credibility of witnesses, where the testimony is contradictory, or where facts are difficult to ascertain. Since the trial court here was making its

determination of a legal relationship from uncontradicted facts, without the necessity of evaluating credibility, the reason for the safeguard of the clearly erroneous rule is absent. *United States v. E. I. du Pont de Nemours & Co.,* 353 U.S. 586, 77 S.Ct. 872, 1 L.ed. 2d 1057 (1957). Therefore, it is submitted that whether the determination of Mastro's employment was a conclusion of law or a mixed question of law and fact, this court is in as good a position to make its determination as was the trial court, and this court should therefore determine the question for itself. *Brown v. Cowden Livestock Co., supra.*

Finally, the mere conclusionary finding accepted by the court as proposed by shipowner's counsel, is clearly insufficient to show what was the trial court's concept of the determinative facts and legal standard. The conclusions of law are no more enlightening. Accordingly, there was no sufficient compliance with Rule 52. *Commissioner v. Duberstein,* 363 U.S. 278, 80 S.Ct. 1190, 4 L.ed.2d 1218 (1960). However, the Court of Appeals need not remand for additional findings, but may make its determination on the record on appeal, where, as here, the record is complete and the evidence is clear and uncontradicted. *Yanish v. Barber,* 232 F.2d 939 (9th Cir. 1956). The court should therefore hold that Mastro was the employee of Stockton Bulk, not Jones, for purposes of indemnity.

(b) Finding of Fact Number One Is Clearly Erroneous

Under Rule 52 (a), findings of fact shall not be set aside unless they are clearly erroneous. Even if find-

ing number one, quoted above, should be considered a finding of fact, it is clearly erroneous and should be set aside.

A finding is clearly erroneous, "when although there is evidence to support it, the reviewing court on the entire evidence is left with the definite and firm conviction that a mistake has been committed." *United States v. United States Gypsum Co.,* 333 U.S. 364, 395, 68 S.Ct. 525, 92 L.ed. 746, 766 (1948).

Thus, "some evidence" is not necessarily "substantial evidence." Substantial evidence is more than merely some evidence, and more than a mere scintilla of evidence. The court should look to all the evidence in the case, and view the evidence urged in support of the findings in the light of all of the rest of the evidence. *United States v. Kaplan,* 277 F.2d 405 (5th Cir. 1960).

As indicated in the previous section of this brief, the employment relationship is based upon a number of factors, including control of the activities of the employee. It is obvious from a review of the evidence that Stockton Bulk and not Jones had that control. In addition, if the form of the relationship is disregarded, and only its substance considered, it is clear that Mastro was the employee of Stockton Bulk.

Since the trial court made no findings of facts underlying the ultimate fact of employment, as requested by Jones below, it is uncertain what the rationale for this determination is. Admittedly, Mastro testified on direct examination:

"Q. Who was your employer, as far as you know, January 9, 1962 (the day of the accident)?
A. Jones Stevedoring Company.
Q. Why do you say that?
A. I got my pay from Jones Stevedoring Company." (Tr. 21-22.)

However, on cross-examination, he acknowledged that the only reason he said that was because Jones was handling the payroll. (Tr. 93.) He felt that any arrangement between Jones and Stockton Bulk was actually none of his business. (Tr. 95.)

Also in evidence as an exhibit is the report of accident, which bore Jones' name. (Defendant's Exhibit D.) This, of course, was in accordance with the arrangement between Jones and Stockton Bulk. It should be noted that Goodwin, Stockton Bulk's manager, made out the accident report and signed it. (Tr. 240.)

In connection with Mastro's testimony, the trial judge was made aware at the time the testimony was taken that there was a substantial and serious question as to who Mastro's employer was and as to who owed any warranty of workmanlike service to the ship. It was immediately apparent that Mastro's testimony referred merely to the form that the employment relationship had taken, under the contractual arrangement between Stockton Bulk and Jones. It is submitted that this testimony is insignificant in light of all the other evidence as to the contractual arrangement and its practical operation. The important consideration in this connection is the substance of the

matter, and not the form. The fact that one of the parties is designated a stevedoring company and one a terminal, is a matter of form and not of substance. Similarly, the fact that Jones' identifying number appeared on Mastro's paycheck, pursuant to the arrangement between Jones and Stockton Bulk is a mere matter of form and not of substance. A decision based upon the mere form of a relationship, disregarding the substance, is not based upon substantial evidence.

The significant evidence as to employment is that relating to the right to direction and control of the employee's activities. (See the preceding section of this brief.) It is clear from the uncontradicted evidence in the case that Stockton Bulk and not Jones had the right to direct and control Mastro's work. Further, although Jones made the arrangements for payment of Mastro's wages, and its identifying number appeared on his checks, the money came from Stockton Bulk. Again, viewing the substance rather than the form of the relationship, it is clear that Mastro was Bulk's employee.

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3. MASTRO'S NEGLIGENCE WAS STOCKTON BULK'S BREACH

It is argued above that Jones made no warranty to the shipowner, and further that Mastro was not Jones' employee. If these arguments are accepted, then it naturally follows that Mastro's negligence could not be a breach of any warranty on the part of Jones. How-

ever, even if the trial court's determination that Mastro was an employee of Jones is accepted, still conclusion of law number one (R. 139), that Mastro's negligence constituted a breach of a warranty owed to the shipowner by Jones, would be incorrect.

Thus, even with this assumption, the nature and basis of the shipowner's right of indemnity still must be considered. As indicated in the first section of this brief, the right of indemnity arises because of expertise, supervision and control, and accident-prevention considerations. As previously indicated, Stockton Bulk rather than Jones was in the position contemplated by these criteria. Therefore, even though Mastro be considered technically Jones' employee, still the warranty was that of Stockton Bulk, not Jones. Since Stockton Bulk agreed to assume the supervision and control of the men hired from the union hall, it should be held responsible for Mastro's negligence, as a breach of its warranty.

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4. THE COURT ERRED IN AWARDING PRE-JUDGMENT INTEREST

Conclusion of law number three awards interest on the damages from the time shipowner paid its attorneys. (R. 139.) This pre-judgment interest should not have been allowed, because the delay of approximately two and one-half years in bringing the indemnity aspects of the case to trial and judgment, was caused by the shipowner's counsel. He admitted to

the trial court that he *intentionally* delayed bringing the matter on for further trial, while waiting for a favorable result in the appeal of another case which bore upon the issues herein. Counsel's remarks are set forth at length in the record. (Tr. 173-174.) For this reason, the award of pre-judgment interest was in error and was an abuse of the trial court's discretion. *The "STJERNEBORG",* 106 F.2d 896 (9th Cir. 1939), affirmed on other grounds *sub nom. Dampskibsselskabet Dannebrog v. Signal Oil & Gas Co.,* 310 U.S. 268, 60 S.Ct. 937, 84 L.ed. 1197 (1940); *The "SALUTATION",* 37 F.2d 337 (2d Cir. 1930).

In *The "SALUTATION", supra,* the court held that it was an abuse of discretion to allow interest in the face of an unexplained delay. The court stated: "Such delays are sufficient reason for forfeiting interest." 37 F.2d at 338. In the instant case, the appellee admittedly caused the delay intentionally, for its own purposes. A fortiori, the shipowner here should be held to have intentionally forfeited any right to pre-judgment interest.

The first portion of the trial was heard on March 22, 23, and 24, 1965. See docket sheet. (R. 155.) The indemnity case was not brought to trial until May 8, 1967, more than two years later. See docket sheet. (R. 156.) The final judgment was not entered until October 30, 1967. (R. 156.)

Accordingly, it is respectfully submitted that it was error and an abuse of the trial court's discretion to award pre-judgment interest. Even if the case is af-

firmed on its merits, the award of interest should be set aside.

CONCLUSION

From the authorities referred to above, the basis for the shipowner's right of indemnity can be seen to arise from the holding out of the contractor as expert in his field, and from his favorable position with regard to minimizing the risks of accidents arising out of the enterprise. Stockton Bulk fits both of these descriptions, and Jones fits neither. Stockton Bulk had the basic contract for the loading of the vessel, and the supervision and control of all of the work. Jones merely provided payroll services under a subsidiary agreement with Stockton Bulk.

Further, the determination of Mastro's employment was erroneous, either as a finding of fact or a conclusion of law. Under any view of the matter, Mastro was Stockton Bulk's employee, and his negligence is a breach of their warranty.

Even if Mastro is assumed to be Jones' employee, still the only warranty in the case that was or could have been breached was that of Stockton Bulk.

Accordingly, it is respectfully submitted that there is no liability of Jones Stevedoring for indemnity to Nippo Kisen Co., Ltd., but that Stockton Bulk Terminal Company of California, Inc., should be held liable to indemnify the shipowner.

If the judgment is affirmed on its merits, the remaining issue of pre-judgment interest should be

resolved in favor of Jones, since the delay was admittedly the responsibility of the shipowner. Therefore, interest during that period of delay should not be allowed.

Dated, San Francisco, California,
June 24, 1968.

Respectfully submitted,
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CERTIFICATE OF COUNSEL

I certify that, in connection with the preparation of this brief, I have examined Rules 18, 19, and 39 of the United States Court of Appeals for the Ninth Circuit, and that, in my opinion, the foregoing brief is in full compliance with those rules.

RONALD H. KLEIN,
Attorney for Appellant.

(Appendix Follows)

Appendix

Appendix

TABLE OF EXHIBITS

No. 22,630

IN THE

United States Court of Appeals

For the Ninth Circuit

JONES STEVEDORING COMPANY, a corporation,
Appellant,

vs.

NIPPO KISEN COMPANY, LTD., a corporation,
Appellee.

NIPPO KISEN COMPANY, LTD., a corporation,
Appellant,

vs.

STOCKTON BULK TERMINAL COMPANY OF CALIFORNIA, INC., a corporation,
Appellee.

Appeal from the United States District Court for the Northern District of California

BRIEF FOR APPELLEE STOCKTON BULK TERMINAL COMPANY OF CALIFORNIA, INC.

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Subject Index

Table of Authorities Cited

Cases

Codes

Statutes

Texts

Rules

No. 22,630

IN THE

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STOCKTON BULK TERMINAL COMPANY OF CALIFORNIA, INC., a corporation,
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Appeal from the United States District Court for the Northern District of California

BRIEF FOR APPELLEE STOCKTON BULK TERMINAL COMPANY OF CALIFORNIA, INC.

I. STATEMENT OF THE CASE

The Findings of Fact and Conclusions of Law between Libelant and Respondent are undisturbed by this appeal and will state the general background of the case. They are as follows:

Findings of Fact

1. Libelant was at all material times employed as a longshoreman by Respondent-Impleaded, Jones Stevedoring Co. and/or Stockton Bulk Terminal Co. of California, Inc.

2. Respondent was at all material times the owner and operator of the MV Hokyo Maru which was engaged in the bulk iron ore trade.

3. On and prior to January 9th, 1962 the MV Hokyo Maru lay at berth port-side to at the port of Stockton, California, for the purpose of receiving a cargo of iron ore in bulk.

4. The usual and customary method of loading such a cargo at Stockton at the time in question, which was followed, in this case, consisted of the use of a shoreside conveyor apparatus which included a large heavy spout. A portion of the conveyor apparatus suspended the spout over the vessel's hold and the spout was used to direct the iron ore to various positions in the hold from time to time. The spout was hinged at the point of attachment to the conveyor to permit the bottom to be pulled in any direction.

5. The movement of the conveyor itself was limited and therefore the ship's cargo falls were used to move or position the bottom of the spout from time to time to the desired position in the ship's hold away from the vertical. This was accomplished by leading the ship's cargo falls fair from the top of the ship's cargo booms down to either side of the hatch coaming at or near which point the fall passed through a snatch block and were attached to a short wire pendant, which in turn was attached near the bottom of the spout. By positioning the snatch blocks at various points

forward and aft on the port or starboard side of the hatch coaming and by using the ship's winches as a source of power, the bottom of the spout could be moved away from the vertical as desired. The spout also had telescoping ability which is not material.

6. A snatch block differs from an ordinary ship's block only in that it can be opened from the side to insert a wire without the necessity of working with or to the end of the wire. In all other respects it is essentially the same as an ordinary ship's block. The throat of a block is that point near the top where wire or rope enters and leaves the block.

7. On or about January 9, 1962, Libelant was aboard the Hokyo Maru shortly before noon in the capacity of gang boss with his gang which was working at No. 2 hatch. No other shoreside workers possessing higher authority than Libelant as gang boss were present at No. 2 hatch at this time but at least two of Libelant's subordinates were present. The Hokyo Maru's Third Officer was also present observing the progress of cargo operations. Shortly before noon, the Third Officer asked that the iron ore cargo be distributed in another location in the ship's hold. The decision on how this should be accomplished rested entirely with Libelant.

8. Libelant, as gang boss, determined it would be necessary to move a snatch block on the starboard or offshore hatch coaming in order to place the spout in a new position. At this time, the starboard cargo fall ran fair from the top of the boom through the snatch block to a short pendant at the base of the spout and it held the bottom of

the spout in an offshore direction away from the vertical. Because of the substantial weight of the spout, the starboard fall was taut.

9. Libelant approached the snatch block with the intention of moving it by himself although additional shoreside help, his subordinates was available at the hatch and, subject to his orders, if he had elected to use it. Libelant, wearing gloves, approached the snatch block and grasped that portion of the starboard cargo fall which ran from the top of the starboard boom down to the snatch block. His right hand was a few feet away from the snatch block. He signalled the winch driver, his subordinate, for slack which was given. The substantial weight of the spout naturally caused it to seek its vertical position, which caused an abrupt movement of the cargo fall as it was slacked.

10. As the starboard cargo fall was being pulled slack by the substantial weight of the spout in seeking its vertical position but before the fall itself had gone slack, Libelant's right hand was suddenly drawn into the throat of the snatch block between the cargo fall and the sheave resulting in traumatic amputation of the outer portion of Libelant's second, third and fourth fingers and tissue and other injury to his first and fifth fingers.

11. All the Hokyo Maru's gear being in use at the time, as well as all appurtenances to the vessel embraced by the seaworthiness warranty conformed with the custom and usage of vessels in the same and similar trade.

12. Placing one's hands or either of them on a wire which is moving or about to be moved, such

as the cargo fall in this case, in the proximity of a snatch block or other fairlead device, involves the foreseeable risk that the person so doing may have his hand caught between the sheave and the wire or fall at the throat of the block.

13. The cargo fall at No. 2 starboard hatch in use at the time in question was in all respects fit and proper, free of defects and customary for the trade.

14. While there was ore dust present on the deck near No. 2 hatch, which is customary in such a loading operation, Libelant has failed to prove such area was rendered dangerous or slippery because of the dust or any combination of the dust and moisture.

15. Libelant has failed to prove that the Hokyo Maru was at any time or in any respect not reasonably fit for the service in which she was engaged and she was in all respects and at all material times fit for such service and seaworthy. Libelant has failed to prove and it is not true that Respondent or any Agent or employee of Respondent acted at any time otherwise than as a reasonable man of ordinary prudence in the circumstances. Libelant has failed to prove and it is not true that Respondent had or should have had notice of any improper condition aboard the Hokyo Maru and has failed to prove and it is not true that such condition existed.

16. Libelant has failed to prove the causal connection between any injuries sustained by him for which he complains and any negligence of Respondent or breach of Respondent's warranty of seaworthiness as vessel owner.

17. The sole proximate cause of any injuries Libelant sustained while on board the Hokyo Maru was the result of his own negligent conduct in placing his hand on a cable or cargo fall that was moving or about to move in the proximity of a snatch block or other obstruction.

Conclusions of Law

1. The Respondent shipowner does not have the burden of an insurer and is not required to provide an accident-proof ship, and the mere occurrence of an accident aboard ship does not impose liability upon the shipowner.

2. Libelant has the burden of proving by a preponderance of the evidence that his claimed injury was proximately caused by the negligence of Respondent or its breach of a warranty of seaworthiness.

3. Respondent was not negligent, did not breach any warranty of seaworthiness and was not otherwise at fault in the premises and any negligence which occurred was that of Libelant himself which was the sole proximate cause of his injury.

4. The parties are entitled to a Decree in favor of Respondent and against Libelant on the Libel reserving adjudication of Respondents' Impleading Petition to a later date."

In summary, these Findings and Conclusions establish that the vessel and the equipment used in loading same were not defective or unseaworthy in any way and that the sole proximate cause of the accident was the negligence of the Libelant himself.

The only fault which could be considered as a basis for a breach of a duty to perform a workmanlike service is the conduct of Libelant himself. No other is alleged, proved or found. On the question of indemnity, the following Findings and Conclusions were made by the trial court:

Findings of Fact

1. Plaintiff, Joseph F. Mastro, was at all material times employed as a longshoreman by Jones Stevedoring Co., and not by Stockton Bulk Terminal Company of California, Inc.

2. Third-party Plaintiff has reasonably expended the sum of $7,132.90 for legal services and expenses in defending the claim of Plaintiff, Joseph F. Mastro.

Conclusions of Law

1. Mastro's failure to exercise reasonable care and caution in the course and scope of his employment by Jones Stevedoring Co., constitutes a breach of Jones Stevedoring Co's., warranty to perform their work in a safe, proper and workmanlike manner.

2. Stockton Bulk Terminal Company of California, Inc., is entitled to a decree in its favor against Third-party Plaintiff.

3. Third-party Plaintiff is entitled to a decree in its favor against Third-party Defendant, Jones Stevedoring Co., in the amount of $7,-132.90, with court costs and interest from March 4, 1966.

The conclusion challenged is that which holds that Joseph F. Mastro was acting in the course and scope of his employment for Jones Stevedoring Co. as distinguished from Stockton Bulk Terminal Company and that his negligence constituted a breach of the warranty to perform workmanlike service. The only facts subject to review involve the relation of Jones Stevedoring Co. and Stockton Bulk Terminal Co. in reference to the employment of Mastro. We shall review them in more detail than heretofore reviewed in the briefs already on file.

Jones Stevedoring Co. (hereinafter referred to as "Jones") was a general stevedoring contractor in the Stockton area handling general and bulk trade cargo (R.T. May 8, 1967, p. 54). It was a member of the Pacific Maritime Association (P.M.A.), which is the employers' bargaining agent with the International Longshore and Warehousemen's Union (R.T. May 8, 1967, p. 47). It was subject to the terms of the Collective Bargaining Agreement between P.M.A. and the I.L.W.U. and could employ longshoremen through the I.L.W.U. hiring hall in Stockton. Only members of the P.M.A. could get men from the Union Hall in Stockton (R.T. May 8, 1967, pp. 50, 51).

Stockton Bulk Terminal Co. was a terminal company at the Port of Stockton. They leased the ore dock facilities, including means of unloading railroad cars of bulk ore, means of stockpiling ore and equipment used to load ore to a ship docked at the ore dock facilities (Deposition of A. W. Gatov, p. 6). They maintained and controlled these facilities and sup-

plied them for loading ships as made necessary under their arrangements with the Port of Stockton (R.T. May 8, 1967, p. 68; Deposition of A. W. Gatov, p. 16). The only employees of Stockton Bulk Terminal Co. were administrative and managerial in nature. They consisted of corporate officers, a general manager, an assistant manager and three clerical helpers. They did not hire others (Deposition of A. W. Gatov, pp. 6, 7, 8). Stockton Bulk Terminal Co. was not a member of P.M.A., was not subject to the terms of the Collective Bargaining Agreement between P.M.A. and the I.L.W.U., and could not "employ" longshoremen, gang bosses or walking bosses from the Union Hall (R.T. May 8, 1967, pp. 49, 50, 76).

Prior to and at the time of the case in question, there existed an oral contract or arrangement to provide longshoremen to operate the loading equipment owned by Stockton Bulk Terminal Co. (Deposition of A. W. Gatov, p. 10; R.T. May 8, 1967, p. 46). The terms of this agreement are not in dispute; only the nomenclature describing the agreement is disputed. Rudolf J. Danska (Vice President of Jones) testified it was a "payroll service" (R.T. May 8, 1967, p. 48). A. W. Gatov, President of Stockton Bulk Terminal Co., testified that Jones was a "labor contractor" (Deposition of A. W. Gatov, p. 7).

The method of operation was as follows: longshoremen, gang bosses, and walking bosses were supplied by the I.L.W.U. hiring halls to work, pursuant to Jones' membership in P.M.A. and their contract with the I.L.W.U. (R.T. May 8, 1967, p. 50); the long-

shoremen and walking boss were ordered by telephone by Leo Goodwin, manager of Stockton Bulk Terminal Co., in the name of Jones (R.T. May 8, 1967, pp. 50, 74); the men provided were a complete "Union set-up" consisting of a walking boss, gang boss and hold men (Deposition of A. W. Gatov, p. 7) and were "supplied" by Jones (R.T. May 8, 1967, p. 6—from testimony of Rudolf Danska); and were all on Jones' payroll (R.T. March 22, 1965, p. 100). The walking boss reported aboard the ship one hour early, and would receive orders from the manager or assistant manager of Stockton Bulk Terminal Co. for "starting the ship. That's all." (Testimony of Leo Goodwin, R.T. May 8, 1967, pp. 77, 78). The gang boss was assigned to report to the walking boss and the longshoremen to report to the gang boss (R.T. March 22, 1965, pp. 97, 98). The chain of command was from the manager or assistant manager of Stockton Bulk Terminal Co. to the walking boss and thence from the walking boss to the gang boss and from him to the longshoremen (R.T. March 22, 1965, pp. 99, 119). Sometimes the gang boss or walking boss received orders direct from the ship's mate (R.T. March 22, 1965, pp. 24, 27). The extent of the supervision by Stockton Bulk Terminal Co. was to inform the walking boss of the "layout of the work", "how much is going into what hatch" (R.T. May 8, 1967, p. 75). The walking boss, gang boss and longshoremen were responsible for the operative details of the work, including rigging the gear (R.T. March 22, 1965, p. 72), and spotting the ship (R.T. March 22, 1965, p. 122 and R.T. May 8, 1967, p. 76).

The payroll was handled on the following basis: the walking boss, gang boss and longshoremen were all on Jones' payroll (R.T. March 22, 1965, p. 100), the payroll is made up by one of the men in the gang, either the walking boss or gang boss (R.T. May 8, 1967, p. 61—testimony of Danska); it is made up in the name of Jones Stevedoring (R.T. March 22, 1965, p. 93); it is then transmitted to Jones, who processes it in its office and reports same to P.M.A. to obtain payment of the men by P.M.A. in accordance with the agreement between the P.M.A. and I.L.W.U. for the account of Jones (R.T. May 8, 1967, pp. 55, 56). This is the way payroll is handled in the stevedoring industry "in every case", "this one and others" (R.T. May 8, 1967, p. 66).

Jones then bills these charges back to Stockton Bulk Terminal Co. with a service charge (R.T. May 8, 1967, p. 56). Stockton Bulk Terminal Co. paid to Jones the entire amount of the payroll, plus all assessments, plus a profit (Deposition of A. W. Gatov, p. 12).

Neither Jones nor Stockton Bulk Terminal Co. contracted with the Ship (Deposition of A. W. Gatov, p. 17). Stockton Bulk Terminal Co. contracted its facilities to the Port of Stockton (Deposition of A. W. Gatov, pp. 16, 19) and contracted, in turn, with Jones to hire the men to operate the equipment (Deposition of A. W. Gatov, pp. 6, 7).

On the occasion of this accident, Libelant Mastro was employed out of the Union hall as a gang boss (R.T. March 22, 1965, p. 22). He was assigned to the

ore dock and reported to the walking boss (R.T. March 22, 1965, pp. 97, 98). Jones employed the walking boss, gang boss and longshoremen. Mastro made out the payroll in the name of Jones and was, in fact, paid through P.M.A. by Jones (R.T. March 22, 1965, pp. 93, 95). He generally got his orders from the walking boss, but since the walking boss was out to lunch at the time of the accident, he got his orders from the ship's mate (R.T. March 22, 1965, pp. 64, 65).

The mate instructed Mastro to load ore aft in the hatch (R.T. March 22, 1965, pp. 36, 37). Mastro was supervising the gang (R.T. March 22, 1965, pp. 64, 65) and made the decision that a snatch block had to be moved in order to pour aft (R.T. March 22, 1965, p. 72). It was while implementing the details of this rigging problem that the accident occurred.

A Workmen's Compensation Lien was asserted in this case by Jones (R.T. March 22, 1965, p. 18). Jones paid the premium for the Workmen's Compensation Policy covering the accident to Mastro (R.T. March 22, 1965, p. 121). Stockton Bulk never paid compensation benefits to Mastro (Deposition of A. W. Gatov, p. 25; introduced in evidence at R.T. May 8, 1967, p. 78). The accident report form 202 directed to the United States Department of Labor was introduced in evidence without objection and shows that Jones reported the accident to its compensation insurance carrier Firemans Fund Insurance Co., and reported Mastro as its employee acting within his course and scope of employment (R.T. May 8, 1967, p. 64). Ordi-

narily, accident reports were made out by the walking boss (on Jones payroll), left in the office of Stockton Bulk and forwarded on to Jones for report to Jones' carrier (R.T. May 8, 1967, p. 70). In this case, however, the walking boss was not on the ship and the gang boss, of course, was injured (R.T. March 22, 1965, pp. 64, 65), so the report was made out by Goodwin and forwarded to Jones (R.T. May 8, 1967, p. 72).

II. SUMMARY OF FACTS

A. No defect of gear owned or supplied by Stockton Bulk contributed to cause of accident.

B. The sole proximate cause of accident was the negligence of Plaintiff.

C. Plaintiff was on Jones' payroll.

D. Plaintiff was subject to orders from walking boss, who was on payroll of Jones.

E. Stockton Bulk's superintendents directed only the ultimate end of the job; all operative details were controlled by the walking boss, who gave orders to the gang boss, who gave orders to the longshoremen. The entire crew from the walking boss to the gang boss to the longshoremen were on Jones' payroll.

F. All rights of employment, including the right to hire and fire arose through the Collective Bargaining Agreement between P.M.A. and the I.L.W.U. Jones was a party to the contract.

Stockton Bulk was not. Only Jones had the right to hire and fire.

G. Jones carried the workmen's compensation insurance covering the men on their payroll and the accident was, in fact, reported to Jones' carrier. Jones has asserted a Compensation Lien in this case.

III. SUMMARY OF ARGUMENT

A. The arguments advanced by Appellant as to the reasons for holding Stockton Bulk for indemnity are not in point here, as there was no defect in any gear owned or supplied by Stockton Bulk.

B. The sole basis of an indemnity in this case arises out of the negligence of Plaintiff Mastro and the imputation of that negligence to his employer.

C. The evidence clearly indicates that Mastro was employed by Jones and was acting in the course and scope of his employment by Jones.

D. The "clearly erroneous" rule applies in this case to determine if the Court erred in determining that Mastro was an employee of Jones.

IV. ARGUMENT

A. THE ARGUMENTS ADVANCED BY APPELLANT AS TO THE REASONS FOR HOLDING STOCKTON BULK FOR INDEMNITY ARE NOT IN POINT HERE, AS THERE WAS NO DEFECT IN ANY GEAR OWNED OR SUPPLIED BY STOCKTON BULK.

There is no dispute that the accident was in no way caused by any defect in gear or equipment supplied by Stockton Bulk, but was solely the result of the negligence of Plaintiff Mastro. The majority of Appellant's argument on "The Basis of Indemnity" assumes that Mastro was an employee of Stockton Bulk at the time of the accident, and concludes that Stockton Bulk is the one to whom the indemnity ought to apply.

Thus he argues that the company chosen to load or discharge is chosen because of its expertise in the field of longshoring. Jones was a stevedore contractor "handling general and bulk cargo trade".

Appellant says the ship owner relies on the contractor's method of operation and his supervision and control of the men. Jones provided the supervision through the walking boss and gang boss and they were responsible for all "operative details of the work, including rigging of gear and spotting of the ship". This is the usual method of stevedore operation and here the walking boss or gang boss would take general orders from either the terminal superintendent or from the ship's mate. Yet it cannot be argued that Mastro was an employee of the ship owner.

Appellant cites cases holding that the contractor is in a better position to prevent accidents as a result of defects in its equipment or human failures on the part of the men doing the work. There was no defect in equipment that caused the accident and only the employer of Mastro could be in a position to exercise control over him to prevent his "human failure". Jones was a member of P.M.A. and was bound by the Collective Bargaining Agreement between P.M.A. and the I.L.W.U. Mastro was a member of the I.L.W.U. and the enforcement procedures which would require that Mastro follow the safety rules and practices contemplated by the agreement would be available only to Jones. Thus, liability should fall "upon the party best situated to adopt preventive measures and thereby reduce the likelihood of injury". *Italia Societa v. Oregon Stevedoring Co.,* 376 U.S. 315 at 324. Jones was that party. Stockton Bulk was not.

Although the ship owner's indemnity is based upon a contractual relationship, it does not follow that the contract must be one between the ship owner and the stevedore (*Crumady v. The Joachim Hendrik Fisser,* 358 U.S. 423). Thus, whereas Stockton Bulk without a contract with the ship owner would be liable to indemnify the ship owner if the equipment supplied for the service of the ship was defective (*Italia Societa v. Oregon Stevedoring,* supra), Jones would be liable to indemnify for the negligence of its men, which subjects the ship owner to a loss (*Arista Cia. De Vapores S.A. v. Howard Terminal,* 372 Fed. 2d 152).

B. THE SOLE BASIS OF AN INDEMNITY IN THIS CASE ARISES OUT OF THE NEGLIGENCE OF PLAINTIFF MASTRO AND THE IMPUTATION OF THAT NEGLIGENCE TO HIS EMPLOYER.

The sole cause of the accident in question was the negligence of the Plaintiff Mastro. In *Arista Cia. De Vapores, S.A. v. Howard Terminal,* supra, such was the finding of the trial court. In holding that the negligence of the injured plaintiff was *imputed* to his employer so as to require the employer to indemnify the ship owner, the court said:

> "The stevedore company's duty under its warranty includes the duty to *provide* longshoremen who will exercise reasonable care for their own safety, as well as for the safety of others, in the performance of their work. Failure of a longshoreman to perform his duties constitutes a breach of the stevedore's warranty rendering the stevedore company liable for all harm to the ship owner resulting from the breach." (Italics ours.)

The longshoremen in this case were "*provided*" by Jones under its contract through P.M.A. with the I.L.W.U. The only remaining question is whether Mastro was employed by Jones and acting in the course and scope of his employment by Jones so that his negligence would be the negligence of Jones and thus the basis of a breach of warranty by Jones.

C. THE EVIDENCE CLEARLY INDICATES THAT MASTRO WAS EMPLOYED BY JONES AND WAS ACTING IN THE COURSE AND SCOPE OF HIS EMPLOYMENT BY JONES.

The evidence is fully reviewed under Statement of the Case. The question is whether that evidence establishes that Mastro was an employee of Jones, acting in the course and scope of his employment, so that his negligence would be imputed to Jones and render Jones liable to the ship owner or whether he was an employee of Stockton Bulk. Here we must look to simple principles of respondeat superior.

Under the rule of respondeat superior the master is held liable for the torts of his servants committed within the course of their employment (California Civil Code Sec. 2338; 32 Cal. Jur. 2d 538).

It must be established (1) that the relation of master and servant existed at the time of the wrongful act; and (2) that the act was done in the course and scope of the servant's employment (*Tarasco v. Moyers,* 81 C.A. 2d 804).

In determining whether the relationship of master and servant exists and with whom it exists, the same principles and tests are applicable. The right of control by the master over the conduct of the servant and the determination of who has the responsibility for the selection and retention of the servant are basically determinative. The right to hire and fire is necessarily a factor in considering the right to control the immediate activities of the servant (32 Cal. Jur. 2d 542). Actual control of the servant is evidence of the right of control (*Lewis v. Constitution Life Co.,* 96 C.A. 2d

191). Not only the right to hire and fire is a factor, but also the obligation to pay wages must be considered (*Peters v. United Studios,* 98 C.A. 373).

Where general and special employment exists, to escape liability the general employer must resign full control of his servant (*Gavel v. Jamison,* 116 C.A. 2d 635). Where the general employer has not relinquished the power to discharge his employee, he is not relieved of liability because the special employer directs the employee where to go and what to accomplish in his work (*Doty v. Lacey,* 114 C.A. 2d 73). Partial control by the special employer, suggestions as to details or cooperation necessary where the work is furnished as part of a larger operation is not sufficient to relieve the general employer of liability (*Doty v. Lacey,* supra). The fact that the employee does not report to the general employer is not controlling (*Peters v. United Studios,* supra).

Applying these rules to the case at hand, Jones had the right to select and retain Mastro, i.e., to hire and fire, and Stockton Bulk did not. Jones had the obligation to and did, in fact, pay Mastro for his services. Control of the operative details of loading the ship, rigging the gear, moving the ship, etc., lay entirely within the discretion of the walking boss and gang boss, both of whom were selected and paid by Jones. Stockton Bulk's superintendent had no right to fire the men supplied by Jones nor could they control the details of the work. They could only inform the walking boss of the layout of the work and the rest was up to the men supplied by Jones. Jones provided the

Workmen's Compensation Insurance covering its employees and this accident was reported to its carrier. Jones asserts a lien herein for benefits provided. Jones was thus protected by the exclusive remedy provision of the Act, 33 U.S.C. Sec. 905, and Stockton Bulk was not.

Looking at all of the evidence as a matter of first impression, it is apparent that the trial court made a correct decision in holding Jones ultimately liable for the negligent conduct of Mastro and thus responsible to indemnify the ship owner.

D. THE "CLEARLY ERRONEOUS" RULE APPLIES IN THIS CASE TO DETERMINE IF THE COURT ERRED IN DETERMINING THAT MASTRO WAS AN EMPLOYEE OF JONES.

Rules of Civil Procedure No. 52 states as follows:

> "Findings of Fact shall not be set aside unless clearly erroneous, and due regard shall be given to the opportunity of the trial court to judge the credibility of witnesses."

The "clearly erroneous" rule governs the findings of Admiralty Court (*Commercial Transport Corp. v. Martin Oil Service,* 374 Fed. 2d 813).

The case of *Taft Broadcasting Company v. Columbus Dayton Local of the American Federation of Television and Radio Artists,* 297 Fed. 2d 149, is not controlling here. In that case there was a stipulated set of facts. Here there is general agreement, but there are significant contradictions in the testimony

of Danska and Gatov. The trial court heard the testimony and evaluated same.

In *Taft* (supra), the court held that the finding of employment was one of law and drew its own conclusions from the stipulated facts. To reinforce its position, the court further held: "If this finding, however is considered to be a finding of fact, then in our opinion it is clearly erroneous."

The appellate court is in no position to superimpose its determination of the facts upon the trial court that took the evidence in the case. It is often said that the question of employment is a mixed question of law and fact. If the court feels the finding of employment is insufficient, the matter should be remanded to the trial court for preparation of additional supportive findings.

If this court feels that the finding is a proper one, the trial court should be affirmed.

V. CONCLUSION

Stockton Bulk was a terminal company providing gear and equipment for bulk loading of cargo. Jones provided the men, including the bosses, with authority to control details of the work. No gear supplied by Stockton Bulk was defective. Mastro was negligent and his negligence was the sole proximate cause of the accident. Mastro was an employee of Jones and his negligence was imputed to Jones; Jones breached its warranty to the ship and even to Stockton Bulk

and should be required to indemnify. The findings and conclusions in this case are supported by the evidence and are not in error. The trial could should be affirmed.

Dated, San Francisco, California,
December 10, 1968.

PARTRIDGE, O'CONNELL, PARTRIDGE & FALL,
ROBERT G. PARTRIDGE,
Attorneys for Appellee Stockton Bulk Terminal Company of California, Inc.

No. 22,630

IN THE

United States Court of Appeals

For the Ninth Circuit

JONES STEVEDORING COMPANY, a corporation,
Appellant,

vs.

NIPPO KISEN COMPANY, LTD., a corporation,
Appellee.

NIPPO KISEN COMPANY, LTD., a corporation,
Appellant,

vs.

STOCKTON BULK TERMINAL COMPANY OF CALIFORNIA, INC., a corporation,
Appellee.

Appeal from the United States District Court for the Northern District of California

APPELLEE'S BRIEF

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Subject Index

Table of Authorities Cited

Cases

Statutes

Rules

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Appeal from the United States District Court for the Northern District of California

APPELLEE'S BRIEF

JURISDICTION

Jurisdiction of this Court exists, under 28 U.S.C. § 1291, by virtue of a Notice of Appeal filed November 21, 1967 (R. 142)[1] from a Judgment (R. 140) entered in the United

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[1]Since the record on appeal comprises a volume of the Clerk's Record and two volumes of the Reporter's Transcript with separate pagination not continuous with the Clerk's Record, we have designated references with "R" for the Clerk's Record and "Tr." for the Reporter's Transcript.

States District Court for the Northern District of California on October 30, 1967.

The District Court had jurisdiction, under 28 U.S.C. § 1333, by virtue of a Complaint (R. 1) for damages and other relief brought against Appellee shipowner herein by an injured longshoreman (Mastro) under the general maritime law and an impleading petition (R. 15) seeking indemnity from Appellant Jones Stevedoring Company (hereafter referred to as stevedore) under the general maritime law.

STATEMENT OF THE ISSUES

The principal issue presented is whether the District Court's finding that the injured longshoreman, Mastro, was an employee of Appellant Jones Stevedoring Co., rather than Appellee Stockton Bulk Terminal Company of California, Inc., should be overturned, when based on what we submit is substantial and convincing evidence in the District Court.

An additional issue is presented by the stevedore's contention, presented for the first time in this Court, that the District Court was in error in awarding interest on the shipowner's damages from the time such sums were paid out by the shipowner.

STATEMENT OF THE CASE

The longshoreman, Joseph F. Mastro, commenced an action against the shipowner by filing a complaint (R. 1) with the usual counts charging negligence and unseaworthiness of the shipowner's vessel, HOKYO MARU, seeking damages for personal injuries.

After trial, with all the parties to this appeal before the Court, the Court found in favor of the shipowner and against longshoreman Mastro, reserving adjudication of the indemnity issue for a later date. The basis of the Court's decision in favor of the shipowner was its finding that "The sole proximate cause of any injuries libelant sustained . . . was . . . his own negligent conduct . . ." (Finding No. 17, R. 113, Appendix "A", *infra.*)[2]

This left to be decided only the question which of the two parties, Jones Stevedoring or Stockton Bulk Terminal was the employer of Mastro, to whom his negligence was to be imputed so as to render it liable to pay the damages of the shipowner, comprising its fees and expenses of defense, and the further question of the amount of such damages.

After hearing further evidence, at a later date, dealing exclusively with the indemnity issue, the Court found:

> "1. Plaintiff, Joseph A. Mastro, was at all material times, employed as a longshoreman by Jones Stevedoring Co., and not Stockton Bulk Terminal Company of California, Inc." (Supplementary Finding 1, R. 139, Appendix "A" *infra.*)

The Court accordingly entered the judgment against the stevedore which is the subject of this appeal.

SUMMARY OF ARGUMENT

The findings in this case, as in other Civil cases, are subject to the "clearly erroneous" rule and therefore are

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[2]The complete Findings of Fact and Conclusions of Law are printed in Appendix "A" to the Brief.

to be affirmed unless the evidence leads to a definite and firm conviction that error has been committed. The evidence in this case does not support—much less compel—the result called for by the stevedore and fully supports the District Court's findings that Jones, as stevedore, employed Mastro. The fault of Mastro was a breach of duty by his stevedore employer, Jones, pursuant to the familiar doctrine of *respondeat superior*.

It should be noted that the interest award of which Jones complains does not run from the entry of judgment against Mastro. Rather, it runs from the date of actual payment by the shipowner. The indemnity case was brought to trial on May 8, 1967, approximately one year after payment, and final judgment was entered on October 30, 1967. (Docket sheet, R. 156.) As the stevedore had the use of the shipowner's money for the period in question no error was committed in the interest award.

ARGUMENT

I. THE FINDINGS ARE TO BE UPHELD UNLESS CLEARLY ERRONEOUS AND ARE IN FACT FULLY SUPPORTED BY THE EVIDENCE.

A. The standard of review here is the "clearly erroneous" rule.

This is an appeal attacking the District Court's findings of fact. The standard of review of findings of fact is established by Rule 52, F.R.C.P., which provides, in part, as follows:

> "Rule 52. Findings by the Court
>
> (a) Effect. . . . Findings of fact shall not be set aside unless clearly erroneous, and due regard shall be

> given to the opportunity of the trial court to judge of the credibility of the witnesses . . . ."

Thus findings made pursuant to Rule 52 are entitled to great weight on appeal. In *United States v. Oregon State Medical Soc.,* 343 U.S. 326, 339 (1952), the Supreme Court said:

> "As was aptly stated by the New York Court of Appeals, although in a case of a rather different substantive nature: 'Face to face with living witnesses the original trier of the facts holds a position of advantage from which appellate judges are excluded. In doubtful cases the exercise of his power of observation often proves the most accurate method of ascertaining the truth . . . . How can we say the judge is wrong? We never saw the witnesses . . . To the sophistication and sagacity of the trial judge the law confides the duty of appraisal.' *Boyd v. Boyd,* 252 NY 422, 429, 169 NE 632, 634."

More recently, this Court has held, in *Neulsen v. Sorensen,* 293 F.2d 454, 460 (9th Cir. 1961), that "in so evaluating the evidence the trial court's appraisal of the credibility of the witnesses is to be accepted, no challenge to such appraisal being permissible in the appellate court."

Thus, the trial Court's finding[3] of fact that Mastro was an employee of Jones Stevedoring is to be upheld unless

---

[3]Appellant appears to contend that employment here is a conclusion of law rather than a factual issue. In this Appellant confuses legal definitions of employment with the determination whether employment exists, under those definitions, in a particular case. Surely it cannot be contended that, if this were a jury case, the issue of employment should have, or much less would have, been taken from a jury by the Court below and decided by the Court.

Appellant can show that the evidence so firmly established Mastro to be an employee of the terminal that it was clearly erroneous to have found otherwise.

There is no support for the stevedore's assertion that the clearly erroneous rule does not apply to the situation in the present case and the stevedore's statement that the facts were uncontradicted and that credibility was not in issue is incorrect, as we will show.

B. The findings and decree in this case are fully supported by the evidence.

The stevedore would have this Court try the issue of longshoreman Mastro's employment *de novo* on evidence supposedly clear and uncontradicted. Testimony surrounding Mastro's employment was contradicted on the record and credibility was very much in issue. Indeed it was the commendable candor of Mastro himself which played a part in judgment against him. Mastro also testified that Jones was his employer. The evasiveness of the stevedore's office manager at the time in question, Rudolph J. Danska, received the careful attention of the Court when the Court closely examined the witness on this crucial issue. (Tr. 216 to 219.) The same witness stood impeached by his deposition wherein he testified that Jones supplied, or at least obtained, among others, the gang boss (Mastro). (Tr. 228, 229.)

The payroll agent concept asserted by the stevedore on page 30 of its brief requires some amplification. Mastro acknowledged on cross-examination that the only reason he considered Jones his employer was because they were handling the payroll. (Tr. 93.) As Mastro went on to

testify under examination by stevedore's counsel, Mr. Klein (Tr. 95):

> "Q. At any rate, so far as you know, Jones handled the payroll?
>
> A. I got my money from Jones Stevedoring Company."

It appears that the employment issue is receiving different treatment from stevedore's counsel in this Court. The colloquy below is revealing:

> "Mr. Partridge: And a claim was duly filed and processed under that workmen's compensation policy in this particular case, was it not?
>
> Mr. Klein: I will make the same objection to this, your Honor. I think the entire question of insurance is irrelevant to the liability as to the ship in this indemnity case.
>
> The Court: We are not talking about the fact of insurance. We are talking about the fact that the company at least regarded the injured stevedore as falling within the covering language of the policy, and to the extent that is consistent with the idea that he was an employee of Jones Stevedoring Company, it has some probative value.
>
> Mr. Klein: I think in line with my prior opening statement, argument, that the issues here are not those of employee/employer relationship, but those of indemnity based upon things that I have mentioned before which I think are the holding out of any company——
>
> The Court: Well, your direct examination was conducted on the theory that the relationship between the stevedoring gang and Jones Stevedoring Company was so tenuous as to preclude any assumption that they were even in the loose maritime sense em-

ployees of Jones Stevedoring Company. Ordinarily you don't make a claim for workmen's compensation benefits on behalf of an employee if he isn't an employee. That is all." (Tr. 230, 231.) (See also Tr. 202, 209.)

The Court's remarks expressed an appreciation of the relevance of compensation under the *Longshoremen's and Harbor Workers' Compensation Act,* 33 U.S.C. 901 *et seq.* and for whose account it was paid and its relationship to employment and, therefore, the indemnity issue. While the evidence with respect to insurance was ultimately stricken on motion of stevedore's counsel (Tr. 248, 249), the accident report form (BEC 202) required pursuant to the *Longshoremen's & Harbor Workers' Compensation Act,* 33 U.S.C. § 930, that was filed on behalf of Jones as an employer, was in evidence before the Court here. (Defendant's Exhibit "D".) It shows Jones Stevedoring Co. as the employer. Title 33 U.S.C. 902 defines employer for the purposes of compensation.

Surely there is no challenge in this Court to the fact that the compensation benefits were paid to Mastro by Jones as a stevedore employer.

Also before the trial Court was the deposition of A. W. Gatov placed in evidence by Stockton Bulk. (Tr. 246.) He was an officer of Stockton Bulk Terminal at all material times and testified:

"Q. Can you outline briefly what the setup was of Stockton Bulk on January 9th, 1962?

A. In what respect?

Q. How was it operating if it had no employees other than the corporate officers?

A. The only employees that the Stockton Bulk Terminal Company ever had were the administrative managerial employees.

Q. All right. Who were they?

A. I can't give you the names of all the individuals. We had—There was myself as President.

Q. Yes.

A. There was a secretary-treasurer. There was a general manager and assistant general manager, a couple of superintendents. I don't recall their names. But the framework was that of an administrative managerial framework. We don't hire others.

Q. In other words, just generally speaking, in addition to the corporate officers, the company operated with a managerial setup?

A. Yes.

Q. You had no manual labor employees as far as you know?

A. No.

Q. What type of work did Stockton Bulk do on January 9th, 1962 and in that general period of time?

A. Well, the only function of the Stockton Bulk Terminal Company was to unload rail cars of bulk mineral materials to stockpile them and to subsequently load that material to ships.

Q. In that connection who did the actual hand labor work? People in your employ?

A. No.

Q. In whose employ were they?

A. We used Jones Stevedoring Company as labor contractors. They hired the men.

Q. And Jones handled all the payroll?

A. That is correct.

Q. Who furnished the supervision of these men?

A. Well, the immediate supervision was provided by a walking boss; that was part of the gang, part of the gang, provided by Jones." (Gatov Deposition, p. 5, line 25 to p. 7, line 9.)

R. J. Danska, an officer of Jones, testified at trial to facts that would support an argument that Jones was merely a payroll agent and was impeached from his deposition:

"Q. Now, under this oral agreement, what did you or what did Jones undertake to provide Stockton Bulk?

A. Well, mostly just the payroll service.

Q. Yes?

A. And probably the ordering of the men for them, but I am not even sure of that.

Q. You are not sure who was to order the men?

A. I am not sure who ordered the men.

* * *

'Q. Now, as far as the supplying of men and labor, it was your understanding that Jones had supplied the walking boss and/or supplied—well, at least obtained the walking boss and its gang because if they did that, et cetera?

A. Yes.'" (Tr. 228, line 26, Tr. 229, line 14.)

The position of Jones as stevedore here in its attempt to avoid the effect of having made compensation payment benefits pursuant to the *Longshoremen's and Harbor Workers' Compensation Act,* 33 U.S.C. 904, in an indemnity case is not new. In *LaBolle v. Nitto Line, Nitto Shosen Kisen Kaisha v. Jones Stevedoring Company,* 268 F.Supp. 16, 1967 A.M.C. 1778 (N.D. Cal. 1967) the argument was advanced by Jones that the injured longshoreman was acting outside the scope of his employment

at the time of his injury. In the Memorandum Opinion which granted indemnity, Chief Judge Harris noted:

> "Further, the company paid full compensation to LaBolle because of the injuries sustained, liability for which is incurred only where an employee is injured in the course and scope of his employment." (268 F.Supp at 18; 1967 A.M.C. at 1780.)

On this record it was surely proper for the trial Court to find that Mastro was the employee of Jones rather than of Stockton Bulk Terminal.

II. THE INTEREST AWARD IS ENTIRELY PROPER.

Finally, the stevedore for the first time raises on appeal the question of interest.[4] The issue is therefore not properly raised before this Court.[5] No matter what court the stevedore chooses in which to raise this point it is without merit.

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[4]The stevedore admitted that interest is due by its statement in its Objections to Findings of Fact and Conclusions of Law and Proposed Modifications and Additions (R. 132) where it raised only the point regarding the sufficiency of proof that attorneys' fees and expenses in connection with defense of the main case had been paid, asserting: "If the shipowners have not paid this amount . . . (legal fees and costs of defense) they are not entitled to receive interest thereon." No exception or objection was made at any stage with regard to "delay" and the award of interest until the case reached this level.

[5]In *American Home Fire Assurance Company v. Hargrove,* 109 F.2d 86, 87 (10 Cir. 1940), the Court said:

> "The contention presented on the cross-appeal is that plaintiff is entitled to interest on the amount of the judgment from February 7, 1938, the date on which he contends that the company denied liability, rather than from the date of the judgment. It is unnecessary to explore the question as the record fails to indicate even remotely that it was presented to

The leading case in this Circuit on the question of interest appears to be *PRESIDENT MADISON,* 91 F.2d 835, 847, 1937 A.M.C. 1375, 1395 (9 Cir. 1937). Though this Court was dealing with the question of interest in connection with vessel collision, it enunciated the policy that interest is necessary to make "just compensation". Holding that the granting of interest is discretionary, the Court said:

> ". . . but the discretion must be exercised with a view to the right to interest unless the circumstances are exceptional".

The Court went on to point out that:

> ". . . this Court is in accord with the holdings in the First, Second, Fifth and Sixth Circuits and District Courts in the Third and Fourth. These are maritime circuits in which nearly all the admiralty cases are litigated." (Citing many cases.)

As was said in *American Smelting and Refining Co. v. Black Diamond Steamship Corp.,* 188 F.Supp. 790, 792, 1960 A.M.C. 2388, 2389 (S.D. N.Y. 1960):

> "It is true that the allowance of interest in admiralty suits rests within the discretion of the court. But the purpose of damages to make whole the injured party may be effectively served only if interest is awarded. It follows, therefore, that discretion may be utilized to disallow interest only in the face of 'exceptional

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the trial court in any manner or at any juncture. It is raised initially on appeal. That cannot be done."

In accord: *Adams v. U.S.,* 318 F.2d 861, 865 (9 Cir. 1963); *Pacific Contact Laboratories v. Solex Laboratories,* 209 F.2d 529, 533 (9 Cir. 1953); *Century Furniture v. Bernhard's, Inc.,* 82 F.2d 706, 707 (9 Cir. 1936); *O'Connor v. Ludlam,* 92 F.2d 50, 54 (2 Cir. 1937).

> circumstances.' *O'Donnell Transportation Co. v. City of New York* (2 Cir.), 1954 A.M.C. 1512, 215 F.2d 92, 95; *Wright* (2 Cir.), 1940 A.M.C. 735, 109 F.2d 699; see *U. S. Willow Furniture Co. v. La Compagne Generale Transatlantique* (2 Cir.), 271 Fed. 184, 186."

A review of the cases in which delay was sufficient to deny interest appears in order.

The stevedore's brief, at page 33, cites *THE SALUTATION,* 37 F.2d 337 (2 Cir. 1930). In that case the final decree was not entered for more than eight and one-half years after filing of the libel and only after a Motion was conditionally granted to dismiss the case for lack of prosecution was the case brought to trial. *THE STJERNEBORG,* 106 F.2d 896, 898 (9 Cir. 1939) (stevedores' brief, page 33), stands only for the proposition that "the allowance of interest is discretionary".

In *THE SCULLY,* 24 F.2d 846 (S.D. N.Y. 1928) the Court again dealt with a collision situation in which the general rule allows interest from the date of the collision. In that situation, however, the collision occurred in 1918 and the report of the Commissioner was not issued until 1927, nine years following the collision. The Commissioner's report was delayed for four years following the closing of case testimony and in that case the Court found an abuse of discretion in awarding interest.

In *P. R. Co. v. Downes Towing Corporation,* 11 F.2d 466 (2 Cir. 1926), five years elapsed between the reference to a Commissioner and his report. In holding that the allowance of interest from the date of the collision was an abuse of discretion, the Court nevertheless granted interest for a period of two years.

The stevedore relies heavily on *THE SALUTATION, supra.* The Court in that case stated it was an abuse of discretion to allow interest in the face of an *unexplained* delay. The cases reviewed above indicate that the first question is whether there has been a delay. None of the cases cited by Appellant nor those reviewed above dealt with the interest time period of approximately one year which is involved in this matter. In fact the cases reviewed above, as well as the ones cited by stevedore involve delays of four, five and eight and one-half years.

If the Court determines that delay is involved it must further determine if the delay was "unexplained". At the beginning of the indemnity trial the Court requested review of the background of the case because the original action previously tried to the same Court had been disposed of nearly two years before. (Tr. 171, lines 7-10.) The opening remarks by counsel for shipowner are directed specifically to the question of whether or not there was an unexplained delay. (Tr. 173, line 10 to 174, line 6.) At the time the main case was tried the question of contributory negligence of the longshoreman as a basis for indemnity was pending before this Court of Appeals and there were conflicts in other circuits as to whether contributory negligence of a longshoreman employee requires an indemnity award.

It had been determined in the trial of the main case that the cause of Mastro's injury was his own negligence. (R. 182.) The pending case referred to by shipowner's counsel is *Arista Cia. De Vapores S.A. v. Howard Terminal,* 372 F.2d 152, 1967 A.M.C. 312 (9 Cir. 1967), which

was decided on February 9, 1967. The final evidentiary phase of this trial commenced on May 8, 1967. *Arista* held that the contributory negligence of the longshoreman was a breach of his employer's warranty to the vessel, the specific point involved in this case.

No point would have been served to try the indemnity involved in the present case based on Mastro's contributory negligence until such time as the *Arista* decision was rendered. To have tried the present case before that decision would have been to force the trial Court to render a decision where the law involved was as yet unsettled and pending before this Court. A decision in this posture of a case could well have resulted in additional appeals and a much more lengthy process than the one actually involved.

It is therefore submitted that any delay in this case was not only explained to the satisfaction of the trial Court but represented the only prudent course for Court and counsel to follow in the interest of economy of time, effort and money to all concerned.

It must be clear that when the courts deny interest for all or part of the period when one party has had the use of another party's money they are imposing a penalty upon the second party for presumably serious procedural derelictions such as are in no way involved in this case.

CONCLUSION

For the foregoing reasons it is submitted the judgment should be affirmed.

Dated, San Francisco, California,
November 4, 1968.

Respectfully submitted,
LILLICK, MCHOSE, WHEAT, ADAMS & CHARLES,
GRAYDON S. STARING,
JOHN W. FORD,
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Attorneys for Appellee.

(Appendix "A" Follows)

Appendix "A"

Appendix "A"

FINDINGS OF FACT AND CONCLUSIONS OF LAW

The case as between Libelant and Respondent was duly tried and oral and documentary evidence received. The case was argued by counsel and submitted. The court having ordered a Decree for Respondent and against Libelant, and having further ordered that additional proceedings on the claim of Petitioner against Respondent-Impleaded be deferred, now makes the following Findings of Fact and Conclusions of Law as to Libelant and Respondent:

FINDINGS OF FACT

1. Libelant was at all material times employed as a longshoreman by Respondent-Impleaded, Jones Stevedoring Co. and/or Stockton Bulk Terminal Co. of California Inc.

2. Respondent was at all material times the owner and operator of the MV HOKYO MARU which was engaged in the bulk iron ore trade.

3. On and prior to January 9th, 1962 the MV HOKYO MARU lay at berth port-side to at the port of Stockton, California, for the purpose of receiving a cargo of iron ore in bulk.

4. The usual and customary method of loading such a cargo at Stockton at the time in question, which was followed, in this case, consisted of the use of a shoreside conveyor apparatus which included a large heavy spout. A portion of the conveyor apparatus suspended the spout

over the vessel's hold and the spout was used to direct the iron ore to various positions in the hold from time to time. The spout was hinged at the point of attachment to the conveyor to permit the bottom to be pulled in any direction.

5. The movement of the conveyor itself was limited and therefore the ship's cargo falls were used to move or position the bottom of the spout from time to time to the desired position in the ship's hold away from the vertical. This was accomplished by leading the ship's cargo falls fair from the top of the ship's cargo booms down to either side of the hatch coaming at or near which point the fall passed through a snatch block and were attached to a short wire pendant, which in turn was attached near the bottom of the spout. By positioning the snatch blocks at various points forward and aft on the port or starboard side of the hatch coaming and by using the ship's winches as a source of power, the bottom of the spout could be moved away from the vertical as desired. The spout also had telescoping ability which is not material.

6. A snatch block differs from an ordinary ship's block only in that it can be opened from the side to insert a wire without the necessity of working with or to the end of the wire. In all other respects it is essentially the same as an ordinary ship's block. The throat of a block is that point near the top where wire or rope enters and leaves the block.

7. On or about January 9, 1962, Libelant was aboard the HOKYO MARU shortly before noon in the capacity of gang boss with his gang which was working at No. 2

hatch. No other shoreside workers possessing higher authority than Libelant as gang boss were present at No. 2 hatch at this time but at least two of Libelant's subordinates were present. The HOKYO MARU's Third Officer was also present observing the progress of cargo operations. Shortly before noon, the Third Officer asked that the iron ore cargo be distributed in another location in the ship's hold. The decision on how this should be accomplished rested entirely with Libelant.

8. Libelant, as gang boss, determined it would be necessary to move a snatch block on the starboard or offshore hatch coaming in order to place the spout in a new position. At this time, the starboard cargo fall ran fair from the top of the boom through the snatch block to a short pendant at the base of the spout and it held the bottom of the spout in an offshore direction away from the vertical. Because of the substantial weight of the spout, the starboard fall was taut.

9. Libelant approached the snatch block with the intention of moving it by himself although additional shoreside help, his subordinates, was available at the hatch and, subject to his orders, if he had elected to use it. Libelant, wearing gloves, approached the snatch block and grasped that portion of the starboard cargo fall which ran from the top of the starboard boom down to the snatch block. His right hand was a few feet away from the snatch block. He signalled the winch driver, his subordinate, for slack which was given. The substantial weight of the spout naturally caused it to seek its vertical position, which caused an abrupt movement of the cargo fall as it was slacked.

10. As the starboard cargo fall was being pulled slack by the substantial weight of the spout in seeking its vertical position but before the fall itself had gone slack, Libelant's right hand was suddenly drawn into the throat of the snatch block between the cargo fall and the sheave resulting in traumatic amputation of the outer portion of Libelant's second, third and fourth fingers and tissue and other injury to his first and fifth fingers.

11. All the HOKYO MARU's gear being in use at the time, as well as all appurtenances to the vessel embraced by the seaworthiness warranty conformed with the custom and usage of vessels in the same and similar trade.

12. Placing one's hands or either of them on a wire which is moving or about to be moved, such as the cargo fall in this case, in the proximity of a snatch block or other fairlead device, involves the foreseeable risk that the person so doing may have his hand caught between the sheave and the wire or fall at the throat of the block.

13. The cargo fall at No. 2 starboard hatch in use at the time in question was in all respects fit and proper, free of defects and customary for the trade.

14. While there was ore dust present on the deck near No. 2 hatch, which is customary in such a loading operation, Libelant has failed to prove such area was rendered dangerous or slippery because of the dust or any combination of the dust and moisture.

15. Libelant has failed to prove that the HOKYO MARU was at any time or in any respect not reasonably

fit for the service in which she was engaged and she was in all respects and at all material times fit for such service and seaworthy. Libelant has failed to prove and it is not true that Respondent or any Agent or employee of Respondent acted at any time otherwise than as a reasonable man of ordinary prudence in the circumstances. Libelant has failed to prove and it is not true that Respondent had or should have had notice of any improper condition aboard the HOKYO MARU and has failed to prove and it is not true that such condition existed.

16. Libelant has failed to prove the causal connection between any injuries sustained by him for which he complains and any negligence of Respondent or breach of Respondent's warranty of seaworthiness as vessel owner.

17. The sole proximate cause of any injuries Libelant sustained while on board the HOKYO MARU was the result of his own negligent conduct in placing his hand on a cable or cargo fall that was moving or about to move in the proximity of a snatch block or other obstruction.

CONCLUSIONS OF LAW

1. The Respondent shipowner does not have the burden of an insurer and is not required to provide an accident-proof ship, and the mere occurrence of an accident aboard ship does not impose liability upon the shipowner.

2. Libelant has the burden of proving by a preponderance of the evidence that his claimed injury was

proximately caused by the negligence of Respondent or its breach of a warranty of seaworthiness.

3. Respondent was not negligent, did not breach any warranty of seaworthiness and was not otherwise at fault in the premises and any negligence which occurred was that of Libelant himself which was the sole proximate cause of his injury.

4. The parties are entitled to a Decree in favor of Respondent and against Libelant on the Libel reserving adjudication of Respondents' Impleading Petition to a later date.

SUPPLEMENTARY FINDINGS OF FACT AND CONCLUSIONS OF LAW

The Court having heard further evidence in this case and having read the briefs and heard the argument of counsel and the matter having been submitted as between Third-party Plaintiff and Third-party Defendants, now makes supplementary findings of fact and conclusions of law as between these parties:

FINDINGS OF FACT

1. Plaintiff, Joseph F. Mastro, was at all material times employed as a longshoreman by Jones Stevedoring Co., and not by Stockton Bulk Terminal Company of California, Inc.

2. Third-party Plaintiff has reasonably expended the sum of $7,132.90 for legal services and expenses in defending the claim of Plaintiff, Joseph F. Mastro.

CONCLUSIONS OF LAW

1. Mastro's failure to exercise reasonable care and caution in the course and scope of his employment by Jones Stevedoring Co., constitutes a breach of Jones Stevedoring Co's., warranty to perform their work in a safe, proper and workmanlike manner.

2. Stockton Bulk Terminal Company of California, Inc., is entitled to a decree in its favor against Third-party Plaintiff.

3. Third-party Plaintiff is entitled to a decree in its favor against Third-party Defendant, Jones Stevedoring Co., in the amount of $7,132.90, with Court costs and interest from March 4, 1966.

No. 22,630

IN THE

United States Court of Appeals

For the Ninth Circuit

JONES STEVEDORING COMPANY,
a corporation,
Appellant,

vs.

NIPPO KISEN COMPANY, LTD.,
a corporation,
Appellee.

NIPPO KISEN COMPANY, LTD.,
a corporation,
Appellant,

vs.

STOCKTON BULK TERMINAL COMPANY OF CALIFORNIA, INC., a corporation,
Appellee.

On Appeal from the United States District Court for the Northern District of California
Honorable Lloyd H. Burke, District Court Judge

APPELLANT'S REPLY BRIEF

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PERNAU-WALSH PRINTING CO., SAN FRANCISCO

Subject Index

Table of Authorities Cited

Cases

Codes

Texts

No. 22,630

IN THE

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NIPPO KISEN COMPANY, LTD., a corporation,	*Appellant,*
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On Appeal from the United States District Court for the Northern District of California

Honorable Lloyd H. Burke, District Court Judge

APPELLANT'S REPLY BRIEF

Appellee Nippo Kisen Company, Ltd., and appellee Stockton Bulk Terminal Company of California, Inc., have both filed briefs in opposition to appellant's opening brief in this matter. This reply brief will consider the two opposing briefs together.

1. THE GENERAL APPROACH

The opposing briefs are cast mainly in terms of the "clearly erroneous rule." That is, the shipowner frames the issues solely as to whether the finding that Mastro was an employee of Jones Stevedoring Company is supported by substantial evidence. That brief, as well as a large portion of the brief filed by Stockton Bulk, then purports to review items of evidence and non-evidence in an effort to support the decision below.

However, the primary question on appeal is not that of the findings. The question is one of law: "Who owed a warranty of workmanlike service to the shipowner?" This is treated in detail in appellant's opening brief, pages 9 to 24, and need not be repeated herein, except to note that when the relevant factors are considered, the conclusion must be that Stockton Bulk rather than Jones owed such a warranty.

Appellee Nippo Kisen, the shipowner, has not even attempted to deal with this question in its brief. This is understandable, since there was absolutely no proof at the trial on this issue favorable to the shipowner. The shipowner failed to establish its right to indemnity against Jones, since it failed to show any relationship between the shipowner and Jones which would give rise to the warranty of workmanlike service under the circumstances. On the other hand, the evidence does show that Stockton Bulk bore such a relationship to the shipowner. This is sufficient basis alone for reversing the judgment and ordering that the impleading petition be dismissed as against Jones.

Appellee Stockton Bulk has attempted to meet this issue by arguing that Jones rather than Stockton Bulk is in the position contemplated by the cases setting forth the basis for indemnity. While this approach at least concedes the validity of appellant's argument on the basis of indemnity, Stockton Bulk's attempt to distinguish the situation is inadequate.

Stockton Bulk's argument in this regard appears to run as follows. There was no defect in any gear of Stockton Bulk which contributed to the accident. Jones, not Stockton Bulk, was responsible for the "operative details." Therefore, Jones and not Stockton Bulk is in the position contemplated by *Italia Societa v. Oregon Stevedoring Co.*, 376 U.S. 315, 84 S.Ct. 748, 11 L.ed.2d 732 (1964). Jones, it is urged, is liable for human failure, and Stockton Bulk for gear defect. Stockton Bulk's brief, 15.

This is a fatal admission for Stockton Bulk. For if the liability is admitted in the one case, it must be because Stockton Bulk owed a warranty to the vessel that its work of loading ships would be done in a workmanlike manner. Thus, Stockton Bulk's concession is in effect an admission that it did owe a warranty to the ship. This, then, is the warranty breached by Mastro's negligence. The fact that human failure rather than defective equipment caused the accident would seem to be of no importance, since Stockton Bulk, not Jones, had supervision and control over the way in which the work was being done as well as the equipment being used. See appellant's opening brief, 17 to 21. Stockton Bulk's argument necessarily admits

that indemnity liability should follow right and exercise of control, which is the very argument urged by appellant. If this is so, a careful review of evidence admitted at the trial supports only the conclusion that Stockton Bulk had the right of control over the men as well as the machinery, and that it fully utilized this right. See the discussion of the evidence below, as well as in appellant's opening brief, 17 to 24.

Stockton Bulk's argument to the contrary is merely circular reasoning, based upon an assumption of the very question to be decided, and aided by a misreading of the evidence. This argument is totally unsupported by the record. Jones was not responsible for "the operative details of the work," either in contemplation of the arrangement between Stockton Bulk and Jones, or in actual practice. The record as cited in Stockton Bulk's review of the evidence at page 10 of its brief did not reach the issue as to which company had and exercised the right of supervision and control. Again, this material is set forth in appellant's opening brief at pages 17 through 24.

It is there shown that on-the-job supervision was carried out by Stockton Bulk's permanent employees, Leo Goodwin and Charles F. Cook, who gave any necessary orders, spotted the ships on arrival, and delegated authority to the walking bosses who were selected on a preferred basis by Stockton Bulk. Jones' activities were limited to paper work. *Ibid.*

Thus, whether human or machine failure was involved, it was Stockton Bulk who was in the position contemplated in *Italia Societa, supra.*

Furthermore, Stockton Bulk's argument overlooks the first of the two reasons for the basis of indemnity, namely the holding-out as an expert in cargo-loading. See appellant's opening brief, pages 10-14. Here, Stockton Bulk not Jones, was the expert in loading ships with bulk ore, in the circumstances of this case. *Id.* 17-19; 21-22.

Thus, the shipowner fails even to recognize the basic issue in this case, and Stockton Bulk, recognizing it, fails to extricate itself from the logical result of its concession.

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2. THE CLEARLY ERRONEOUS RULE

At pages 24 to 28 of its opening brief, appellant Jones Stevedoring Company argued that this court is not bound by the "clearly erroneous rule". In opposition, the shipowner merely states that there is no support for this assertion, and notes that the issue of employment would have gone to a jury in a jury case. Shipowner's brief, 5-6.

However, at the trial, the shipowner took the opposite approach, and in objecting to a question asked of appellant's witness, Rudolph J. Danska, regarding employment, contended that employment was a legal conclusion to be arrived at based upon the underlying facts.[1]

Appellee shipowner should not now be allowed to argue just the opposite of what it relied on to its

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[1] "By Mr. Klein: Q. Now, without labeling the men that came out of the hall and ignoring that for a moment, were any em-

benefit in the trial court. Having urged there that employment is a legal determination to be made from underlying facts, it should not be allowed to assert here on appeal that it is a simple factual determination which was resolved by the trial judge by a process of believing one set of witnesses as against another, based upon their credibility.

Employment is a legal conclusion, as originally stated by shipowner's counsel, and this is the reason that Jones urged the trial court to make extensive factual findings to support its legal determinations, and the reason that Jones on appeal urges that the clearly erroneous rule does not apply. See Objections to Findings of Fact and Conclusions of Law and Proposed Modifications and Additions, R. 132-137, and appellant's opening brief, 24-28.

In this connection, it is difficult to understand the importance ascribed to credibility at the trial. Shipowner's brief, 6, 10. Certainly, credibility was very much in issue in the main or personal injury portion of the trial, resulting in a judgment against Mastro. However, on the issues of indemnity, the factual mat-

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ployees of Jones Stevedoring Company ever on the ore dock in connection with these loading operations?

The Court: Wait a minute. Is there an objection to that, Mr. Partridge?

Mr. Partridge: I must confess that I was looking at my notes rather than——

The Court: Let's rely on Mr. Ford.

Mr. Ford: I would object to it on the ground of whether or not he is an employee calls for a legal conclusion, an ultimate fact to be found by this Court, and he can testify under what facts the men were there and who could fire them.

The Court: I will sustain it on that ground." (Tr. 220.)

ters were uncontradicted, and in some part the subject of stipulation. Only the conclusions were contested.

The alleged close questioning of Danska by the court suggested at page 6 of the shipowner's brief, had to do with whether Jones or Stockton Bulk actually called the union hall to obtain the longshoremen to work at the ore dock. (Tr. 216-219.) Whether or not this testimony was evasive as urged by the shipowner's brief at page 6 seems quite beside the point when is later admitted on the record by Stockton Bulk's superintendent, Cook, that he ordered the men from the union hall. (Cook deposition, placed in evidence at Tr. 235, and read into the record at Tr. 243.) Mastro testified that Stockton Bulk's manager, Goodwin, also called the hall. (Tr. 95-96.)

Similarly, the shipowner alleges at pages 6 and 10 of its brief that Danska was impeached. This again referred to who ordered the men from the hall, and in view of Cook's admission, seems totally without point. In any case, there was no impeachment, since the prior statement was not clearly inconsistent. Witkin, California Evidence § 1254 (2d ed. 1966). In his testimony at the trial, Danska stated that the longshoremen were dispatched from the longshore hall, and that Stockton Bulk "ordered these men." (Tr. 217.) The prior statement in the witness's deposition was that Jones probably ordered the men from the hall, but that he was not sure. (Tr. 229.) Again, on cross-examination at the trial, he explained that at the time of the deposition he was not sure, but had confirmed the information since then that Jones did

not order the men. (Tr. 232-233.) If "impeachment" this was, it appears quite innocuous in the context of the trial.

Stockton Bulk admits that there was general agreement in the testimony in this case, with some alleged significant contradictions between that of Danska and A. W. Gatov, President of Stockton Bulk. Stockton Bulk's brief, 20. These supposed contradictions form the basis for distinguishing this case from *Taft Broadcasting Co. v. Columbus-Dayton Local,* 297 F. 2d 149 (6th Cir. 1961). In that case, cited in appellant's opening brief at pages 25 to 27, the court held that the determination of employment was in reality a conclusion of law, and that the appellate court was free to draw its own legal conclusions and inferences. There, the trial was upon stipulated facts. Here, it is asserted, the contradictions mentioned above serve to distinguish that case. However, these contradictions are not pointed out in Stockton Bulk's brief. A perusal of Stockton Bulk's extensive review of the evidence in its brief at pages 8 to 13 reveals one distinction in the area of legal conclusions. It is indicated at page 9 that Danska testified that the arrangement between Jones and Stockton Bulk was a "payroll service," while Gatov testified that Jones was a "labor contractor." Stockton Bulk admits that this is only a dispute as to "the nomenclature describing the agreement." *Ibid.* Beyond that, no contradictory evidence is shown, and the record reveals none.

In addition, the facts were the subject of a number of stipulations set forth in the record. (Tr. 223-225.)

The remaining evidence is clearly uncontradicted, as set forth in appellant's opening brief, beginning at page 17.

Finally, the trial judge seemed firmly of the opinion that there was no conflict in the evidence, but that it was just a determination of law to be made. (Tr. 222-225, 235.) No doubt for this reason, he elicited the various stipulations indicated above, and on several occasions indicated that he would accept the facts as stated by Danska, in the absence of anything contrary, which did not in fact develop. (Tr. 222, 224.)

In these circumstances, it is difficult to see any need for the evaluation of credibility, and it is clear that the judge was not doing so. The distinction between this case and *Taft Broadcasting Co., supra,* therefore disappears, and the Court of Appeals can review the trial court's determination for what it is: a conclusion of law.

Stockton Bulk urges that "The appellate court is in no position to superimpose its determination of the facts upon the trial court that took the evidence in the case. It is often said that the question of employment is a mixed question of law and fact." Stockton Bulk's brief, 21. As indicated in appellant's opening brief, whether the determination of employment was a conclusion of law or a mixture, the appellate court is empowered to and should make its own determination in this regard. Appellant's opening brief, 27-28.

However, Stockton Bulk goes on, if further findings of fact are necessary, the case should be remanded for that purpose to the trial court. Stockton Bulk's

brief, 21. In view of the uncontradicted state of the evidence, it is clear what additional findings would be made upon remand. They would inevitably be those suggested by Jones to the trial court. Objections to Findings of Fact and Conclusions of Law and Proposed Modifications and Additions. (R. 132-137.) These findings of fact, or similar ones, can and should be adopted by the Court of Appeals. *Yanish v. Barber,* 232 F.2d 939 (9th Cir. 1956).

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3. THE EVIDENCE

If the record is reviewed, it will be seen that there is no substantial evidence to support the conclusion or finding that Mastro was Jones' employee for purposes of indemnity. The evidence has previously been analysed in appellant's opening brief, and the present brief will deal only with the matters raised in the briefs of appellees.

In attempting to support the determination made below, the shipowner resorts to a review of matters that were not in evidence at the trial, presumably because there is a lack of substantiating evidence with which to deal. For example, most of pages 7 and 8 of its brief concern colloquy of court and counsel, which is obviously not evidence. The subject was insurance, and all testimony on this subject was stricken by the court on appellant's motion. (Tr. 248-249.) At pages 10 and 11, reference is again made to workmen's compensation, of which there is no evidence in the record. Similarly, Stockton Bulk utilizes such items

of non-evidence to buttress its argument. Stockton Bulk's brief, 12, 14, 19-20. In any event, the trial judge did not consider that workmen's compensation benefits constituted a deciding factor, and stated that he would not regard it as such. (Tr. 231.) In this, he was correct. *Deorosan v. Haslett Warehouse Co.,* 165 Cal.App.2d 599, 611-612, 332 P.2d 442 (1958).

Removing this material from consideration, there is left very little of the shipowner's brief. There is Mastro's conclusion that Jones was his employer, but that is tempered by the additional testimony that he so testified since Jones was handling the payroll. Further, he testified that Cook or Goodwin, Stockton Bulk's permanent employees, called the union hall for the longshoremen and gave any orders with regard to the work done at the ore dock, which is where he went to work. (Tr. 95-98.) Thus, there is evidence contradicting the conclusion within Mastro's own testimony.

The accident report, defendant's exhibit "D" is in evidence, showing Jones Stevedoring Company as Mastro's employer. However, this was pursuant to the oral arrangement between Jones and Stockton Bulk, and it should be noted that Goodwin made out the accident report and signed it. (Tr. 240.) Thus, when viewed in context, this fact is of no significance.

This leaves the testimony in the deposition of A. W. Gatov, President of Stockton Bulk, quoted at length in the shipowner's brief at pages 8 to 10. This testimony consists largely of self-serving legal conclusions regarding the operation of the business in connection

with the oral arrangement with Jones. The significant portion of the testimony is as follows: "Well, the only function of the Stockton Bulk Terminal Company was to unload rail cars of bulk mineral material to stockpile them and to subsequently load that material to ships." (Gatov deposition, page 6, lines 22-24.) That is, Stockton Bulk stevedored the vessel. This testimony is in accordance with the arrangement between Jones and Bulk whereby Jones would take care of payroll matters for Stockton Bulk's ship-loading work. The conclusion that "The only employees that the Stockton Bulk Terminal Company ever had were the administrative managerial employees," (Gatov deposition, page 6, lines 5-6) is refuted in the portion of Gatov's own testimony quoted by shipowner in its brief at page 9, when he admitted that there were "a couple of superintendents" in the employ of Stockton Bulk. (Gatov deposition, page 6, line 12.) These men were obviously operations people, not administrative people, as can be seen from their duties, shown below. This is also hinted at when Gatov evaded the direct question "Who furnished the supervision of these men?" by stating that "The immediate supervision was provided by a walking boss. . . ." (Gatov deposition, page 7, lines 7-8.) A review of the entire deposition, including portions not quoted by the shipowner, further underscores this aspect of the testimony, and places the quoted portion in its context. For example, shipowner's counsel asked Gatov: "On January 9th, 1962 did Stockton Bulk Terminal have any employees other than the executive officers of the corporation?" The answer was "No." (Gatov deposition, page 5,

lines 22-24.) Mr. Gatov, of course, had to retreat from this position upon close questioning. For example, he admitted that Cook and Goodwin, the superintendents, had three assistants to keep track of the material loaded aboard ships. These people were concerned with the total operation of the company, in getting the material from the railroad gondola cars, to the stockpile, to the ship. (Gatov deposition, page 8, lines 9-23.) He admitted that Cook and Goodwin gave orders to the walking boss "with respect to where the cargo was going and how much was going in there and whether it would go center line drop or to the wings, the stowage having been worked out between our supervisor and the vessel's officers." (Gatov deposition, page 9, lines 1-6.) It is abundantly apparent that this company did not operate with a mere executive skeleton, but was closely involved in the business of loading ships with bulk ore, which, of course, was its business. There was an unusual arrangement for the handling of its payroll matters, but this did not in any way remove Stockton Bulk from the conduct of its own business. Thus, Gatov's deposition testimony merely confirmed other evidence in the case with regard to the arrangement between Jones and Bulk, and how that arrangement was carried out in practice on Stockton Bulk's ore dock.

The shipowner concludes the liability portion of its brief with a reference to *LaBolle v. Nitto Line,* 268 F.Supp. 16 (N.D.Cal. 1967). It is clear even from the facts stated in shipowner's brief that this case is not in point. No issue was raised in that case as to the existence of a warranty owed to the ship, nor were

there any issues as to who employed the injured longshoreman. It was merely urged that the longshoreman was not acting within the scope of the admitted employment, but was on a frolic of his own when he entered an unlit hatch. Among the items of evidence which were held to negate this defense was the fact that the company paid compensation, liability for which arises only when the injury is in the course and scope of employment. In the present case, there is no such issue raised, and the questions presented are entirely different. This is particularly so in view of the fact that the motion to strike testimony as to compensation was granted below. (Tr. 248-249.)

The items of non-evidence should also be removed from consideration of Stockton Bulk's brief. The facts recited in the statement of the case, summary of facts, and argument are replete with misleading statements as to what was admitted into evidence, and as to what the evidence actually was. For example, there is no evidence as to any collective bargaining agreement between P.M.A. and the International Longshoremen's and Warehousemen's Union. Stockton Bulk's brief, 8, 13-14, 16. Thus, when Stockton Bulk argues at page 9 that it "could not 'employ' longshoremen, gang bosses or walking bosses from the Union Hall," it is misleading and incorrect, and it ignores all of the evidence in the case as to the arrangement between Jones and Bulk. It is misleading in stating facts not in evidence when Stockton Bulk, at page 13-14 of its brief, purports to "summarize the facts" by stating: "All right of employment, including the right to hire and fire arose through the

Collective Bargaining Agreement between P.M.A. and the I.L.W.U. Jones was a party to the contract. Stockton Bulk was not. Only Jones had the right to hire and fire." This is also true of the statement at page 16 of that brief: "Mastro was a member of the I.L.W.U. and the enforcement procedures which would require that Mastro follow the safety rules and practices contemplated by the agreement would be available only to Jones." There is absolutely no evidence in the record to support these statements by Stockton Bulk.

Actually, the only evidence as to the right to hire and fire was to the effect that Stockton Bulk itself could choose the walking bosses it wanted to do its work (Tr. 226-227), and that Stockton Bulk would call the union halls and order the necessary men. (Tr. 95-96; 217; 242-243.) No other evidence with regard to the right to hire and fire appears in the record.

Similarly, Stockton Bulk's brief is misleading as to the control of the work done in loading ships with bulk ore. Stockton Bulk would have the court believe that Stockton Bulk's supervision consisted of showing the men where the ship was, and telling them what material was to be loaded, leaving everything else to the longshoremen. At page 10 of its brief, Stockton Bulk purports to quote testimony of its superintendent, Leo Goodwin, as to what orders he would give to the walking bosses. It appears that the orders would be for "starting the ship. That's all." A review of the record will show that this statement is misleading in the extreme. At that point of the trial, counsel for

Stockton Bulk was reading from the deposition of Charles F. Cook, one of the superintendents for Stockton Bulk. What Mr. Cook actually said was as follows:

> "Q. Now will you tell me what the procedure is once the men arrive, what time approximately would they arrive, who would arrive first.
>
> A. The walking boss would arrive first. He is paid one hour prior to starting time.
>
> Q. And then you would—
>
> A. I would give him the orders for the shift starting the ship.
>
> Q. You say the walking boss would come out an hour earlier?
>
> A. Yes." (Cook deposition, page 39, lines 7-16; partially read into the record at Tr. 245-246.)

The words "that's all," were those of Stockton Bulk's counsel at the trial indicating that he was finished reading from the deposition. It certainly was not "all" as to the direction and control given by Cook or Goodwin for Stockton Bulk. Cook went on in his deposition to show the extent of his and Goodwin's authority. Cook would discuss the entire operation with the walking bosses at the start of each shift, and most necessary orders would be given then. If there was some change in plans, obviously new orders would have to be issued later. (Cook deposition, page 40, line 4 to 7.)

In addition, Goodwin was in charge of the ore dock, and if any orders were to be given, he gave them. If he was not on duty, then Mr. Cook gave the orders. Thus, "all orders in regard to stowage of these vessels

came from Mr. Cook or Mr. Goodwin. . . ." (Tr. 96, 123.) Cook or Goodwin would confer with the mate with regard to decisions to be made as to stowage. (Tr. 97.)

Stockton Bulk's statement at page 10 of its brief states that "The walking boss, gang boss and longshoremen were responsible for the operative details of the work, including rigging the gear . . . and spotting the ship," is not supported by the references to the record, nor by the other evidence. Stockton Bulk refers to the record at page 122, but it is seen that the testimony there was that orders with regard to spotting or shifting the ship would be given to the walking boss by Cook or Goodwin. (Tr. 122.) When such a decision was made by the walking boss, it is clear that he was exercising authority delegated to him by the superintendents. (Tr. 244.)

Stockton Bulk's assertion at page 11 of its brief, regarding the preparation and handling of the payroll, is somewhat misleading, in that it omits the fact that after the payrolls were made up by the walking boss or gang boss, they were turned into the office of Stockton Bulk. (Tr. 227, 233-234.) Thereafter, Stockton Bulk forwarded the payroll materials to Jones for processing under the oral arrangement between them. (Tr. 227, 233-234.)

At page 11 in its brief, Stockton Bulk characterizes the payments made by Stockton Bulk to Jones under the arrangement as "the entire amount of the payroll, plus all assessments, plus a profit." Reference is made to the deposition of Gatov, at page 12. Actually,

the "profit" to Jones was, in Gatov's words, "in the form of a service charge per check." (Gatov deposition, page 13, line 1.) There was no compensation measured by tonnage or hours worked. This clearly shows what Jones was being compensated for: Its clerical and payroll services performed pursuant to the oral contract with Bulk; not for stevedoring. (Gatov deposition, page 12, lines 18-20.)

Finally, with regard to the accident report, it is misleading for Stockton Bulk to state in its brief at page 13 that accident reports were ordinarily made out by the walking boss, since the testimony was that the accident report for the present injury was made out by Goodwin. Normally, he considered it his duty to see to it that such a report was made out in case of any accident. (Tr. 240.)

Stockton Bulk's argument that Jones was in a better position to prevent Mastro's "human failure" than Bulk, founders on the record, which shows that Stockton Bulk had the right to supervise and direct the operation, and exercised that right. Jones did not have that right under the arrangement with Stockton Bulk, and in no way supervised or controlled the operation. Appellant's opening brief, 20-21. Jones had no opportunity to prevent work being done by an improper method, but Stockton Bulk was in just such a position, since it was in control of the operation. Accordingly, under *Italia Societa, supra,* liability should fall upon Stockton Bulk.

Stockton Bulk argues that under *Arista Cia. DeVapores v. Howard Terminal,* 372 F.2d 152 (9th Cir.

1967), whoever "provides" longshoremen who are negligent, should be liable to the ship. Jones may have "provided" the longshoremen to Stockton Bulk under its oral arrangement, but it is clear that Stockton Bulk "provided" the longshoremen to the ship. The portion of the decision quoted at page 17 of Stockton Bulk's brief indicates that the duty to provide safely-working longshoremen arises from the warranty of workmanlike service owed to the vessel. The only warranty in the case is that of Stockton Bulk. Mastro's negligence must therefore be Stockton Bulk's breach.

At pages 18 through 20 of its brief, Stockton Bulk agrees with appellant's argument that the determination of employment must take into consideration the factors of direction and control. Further, Stockton Bulk urges, the right to hire and fire is a factor, as is the obligation to pay wages. However, as indicated above, there is no evidence that Jones had the right to select and retain Mastro and that Stockton Bulk did not have this right. As to payment of wages, the actual payment to the men was made by P.M.A. (Tr. 234.) In arguing at page 19 that "Jones had the obligation to and did, in fact, pay Mastro for his services," Stockton Bulk must of necessity be arguing that Jones paid Mastro because Jones reimbursed P.M.A. However, this concept carried to its next logical step requires the conclusion that Stockton Bulk in fact paid Mastro, for Stockton Bulk reimbursed Jones for the money thus expended. (Tr. 215, 224, 234; Gatov deposition, 11-13.)

This leaves the factor of direction and control, which is dealt with at length in appellant's opening brief, pages 18-24. The obvious conclusion is that Stockton Bulk was the employer.

At page 19 of its brief, Stockton Bulk raises the question of general and special employment, citing some California authorities. In this analysis, Jones would be the general employer, and Stockton Bulk would be the special employer.

The pertinent authority in this area is *Deorosan v. Haslett Warehouse Co., supra,* 165 Cal.App.2d 599, 332 P.2d 442, (1958). That case confirmed the general rule that where an employee is provided by his general employer to a special employer, the special employer and not the general employer is master *pro hac vice* and liable for injuries caused by the acts of the employee, while engaged in the performance of duties pertaining to the special service, if in the special service he is subject wholly to the direction or control of the special employer.

Here, the evidence, as indicated above, shows that Stockton Bulk and not Jones had total control over the work done. The only evidence as to the right to hire and fire indicates that Stockton Bulk and not Jones held that right to the extent that it existed.

In passing, the court in *Deorosan, supra,* distinguishes the cases cited by Stockton Bulk on their facts. In those cases, the general employer leased equipment and also furnished the employee to operate it. The general employer was held to have retained a vital interest in the proper operation of the equip-

ment, and was not allowed to escape liability. However, in *Deorosan* as well as in the instant case, no such equipment was involved. In fact, in the present case, the equipment utilized was that of Stockton Bulk, the special employer.

It should be noted that in *Deorosan,* the general employer alone had the right to fire the employee, and retained him on its payroll, although the wages were reimbursed by the special employer. The important fact was that the employee was under the direction and control of the special employer, as in this case.

Further, the court in *Deorosan* held that the fact that the general employer, who was exonerated from liability, provided workmen's compensation coverage, was immaterial with regard to the liability of the general employer for the acts of the employee.

Finally, Stockton Bulk has characterized Jones' role in this matter as that of a labor contractor or labor agent. (Gatov deposition, page 10, lines 17 to 18; Stockton Bulk's brief, 9.) In California, a labor contractor is treated as an employment agency. See California Labor Code, section 1551 (c), repealed in 1967 and replaced by California Business and Professions Code, section 9902 (c).

---

4. CONCLUSION

This is a unique case in a unique field of law. There is accordingly no easy answer to the issues raised herein, nor any one authority to which reference can be made. The principles to be applied must be culled

from various cases which have dealt with the relationships involved herein. The decisions examining the nature of the shipowner's right to indemnity provide the primary illumination to the problem. The warranty of workmanlike service is seen arising out of the relationship because of the expertise of the company loading the vessels, and its direction and control which give it the best ability to prevent accidents. In the circumstances of this case, that means that Stockton Bulk and not Jones owed such a warranty. Secondarily, this same direction and control result in the determination that Stockton Bulk was for all practical purposes Mastro's employer.

Although the shipowner has evaded the issue, Stockton Bulk has conceded that the basic analysis is correct. It is then faced with the task of justifying the decision in these terms, based upon a record that does not support it.

The result must be a reversal of the judgment below, and dismissal of the action as against Jones.

Dated, San Francisco, California,
March 5, 1969.

Respectfully submitted,
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By RONALD H. KLEIN,
Attorneys for Appellant
Jones Stevedoring Company.

No. 22631

IN THE

United States Court of Appeals

For the Ninth Circuit

PETER F. COMSTOCK; ANN FETTER; SUE D. GOTTFRIED; IRWIN R. HOGENAUER and SELMA WALDMAN,
Appellants,

v.

UNITED STATES OF AMERICA,
Appellee.

APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF WASHINGTON,
NORTHERN DIVISION

HONORABLE WILLIAM T. BEEKS, *Judge*

BRIEF OF APPELLANTS

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SUBJECT INDEX

TABLE OF AUTHORITIES

Table Of Cases

Statutes

Other Authorities

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Appellants,

v.

UNITED STATES OF AMERICA,
Appellee.

APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE WESTERN DISTRICT OF WASHINGTON, NORTHERN DIVISION

HONORABLE WILLIAM T. BEEKS, *Judge*

BRIEF OF APPELLANTS

JURISDICTION

Appellants were charged by information in the United States District Court for the Western District of Washington, Northern Division, of being in violation of R.C.W. 9.27.060(2).

By virtue of 18 U.S.C.A. § 7, 13 the state criminal code is made applicable to offenses alleged to have been committed on lands reserved or acquired for the use of the United States Government, where the act alleged to have

been committed is not made punishable by an enactment of Congress.

This case went to trial on December 27, 1967 and ended the same day. The court found appellants guilty as charged (Tr. 103).

Immediately after the court's oral pronouncement of guilt and upon adjournment of court, appellant Hogenauer refused to rise (R. 52). Appellant Hogenauer was adjudged in contempt of court (R. 53) and subsequently sentenced to 15 days in jail (R. 73).

On January 19, 1968 the court entered judgment and sentence as follows:

> "1. Appellants Comstock and Fetter – 30 days in jail and a fine of $300; jail sentence was suspended and a 2-year probation imposed (R. 75). On January 26, 1968 the aforesaid sentence was vacated on to appellant Comstock and he was granted a deferred sentence for a period of 2 years (R. 107).
>
> "2. Appellants Gottfried and Waldman—Jail sentence of 60 days plus a $500 fine; jail sentence suspended upon a two-year probation;
>
> "3. Appellant Hogenauer for violation of 18 U.S.C.A. § 7, 13 and R.C.W. 9.27.060(2). Jail sentence of 1 year and a fine of $1,000. Jail sentence suspended following 60-day imprisonment, upon a 5-year probation. Appellant Hogenauer for violation of 18 U.S.C.A. § 401; jail sentence of 15 days said term to run consecutively to the jail sentence imposed for violation of 18 U.S.C.A. § 7, 13 R.C.W. 9.27.060(2)."

On January 26, 1968 appellants filed Notice of Appeal (R. 109).

The U. S. Circuit Court of Appeals for the Ninth Circuit has jurisdiction by virtue of Section 1291 of the Judicial Code Title 28 U.S.C.A. §1291.

STATEMENT OF THE CASE

On October 17, 1967 at approximately 8:30 a.m. a group of some 200 persons gathered around the Federal Office Building located at 1st and Marion Street in the City of Seattle, Washington (Tr. 20). Shortly thereafter many of these people entered the building in groups of 5 to 10 and entered the office of Group A of Local Selective Service Boards of King County, Washington, located in this building (Tr. 21). The entrance and exit of these persons was orderly and peaceful and the normal operation of the board continued (Tr. 20, 21). At about 8:50 a much larger crowd of people entered the building, so that it became difficult to enter the Selective Service Office (Tr. 21).

At approximately 10:30 a.m. a number of persons sat down in a double doorway, the entrance to the Selective Service Office, and in a doorway leading to a small foley some 20 feet to the east of the entrance to the Selective Service Office (Tr. 23, 24).

These people were quite peaceful and made no disturbance except for blocking the doorway (Tr. 40).

All of the appellants were identified by various police officials as being persons arrested by them for blocking either of the aforedescribed doorways (Tr. 43, 44, 50, 58, 59, 62, 63, 73).

While appellants Gottfried and Hogenauer were identified as having been in the building and having been arrested while being seated in a doorway (Tr. 43, 44, 73), there was no testimony that these particular defendants were assembled with others in this activity.

Following presentation of appellees' case, counsel for

appellants rested and moved to dismiss (Tr. 89). This motion was denied (Tr. 102). The court then found appellants guilty as charged (Tr. 102).

Following the court's pronouncement, the bailiff was ordered to adjourn court. At the call of everybody rise, appellant Hogenauer remained seated (R. 70). The court instructed appellant Hogenauer to rise or be adjudged in contempt (R. 70). Appellant Hogenauer remained seated (R. 70). The court ordered appellant Hogenauer to be carried forward and he was dragged forward by the Marshal (R. 70, 71). Appellant was thereupon found in contempt (R. 71).

SPECIFICATION OF ERRORS

1. The court erred in denying appellants' motion to dismiss on the grounds the R.C.W. 9.27.060(2), is in violation of the Constitution of the United States (Tr. 102).

2. The court erred in entering a verdict of guilty as to the appellant Hogenauer and Gottfried inasmuch as there was no evidence from which it could be determined that the aforesaid appellants were in fact unlawfully assembled.

3. The court erred in holding the appellant Hogenauer in contempt of court (R. 67, 73).

4. The court erred in exercising Summary Power pursuant to Rule 42(a).

SUMMARY OF ARGUMENT

I.

R.C.W. 9.27.060(2), is unconstitutional on its face

inasmuch as it purports to hold unlawful acts that are constitutionally protected. Appellants to challenge this statute need not demonstrate that their actions are constitutionally protected.

II.

There was no evidence that appellants Hogenauer and Gottfried assembled with two or more persons in a manner to disturb the public peace.

III.

Appellant Hogenauer's failure to rise at the adjournment of court did not constitute contemptuous conduct.

IV.

Appellant Hogenauer's conduct was not such as to require summary contempt procedure pursuant to Rule 42(a), in that it neither threatened the court nor obstructed justice.

ARGUMENT

I.

R.C.W. 9.27.060(2) Is in Violation of the Constitution of the United States

Appellants were convicted for alleged violation of R.C.W. 9.27.060(2):

> "Whenever *three or more persons* shall assemble with intention . . .
>
> "(2) To carry out any purpose in such a manner as to disburb the public peace . . . such an assembly is unlawful, and every person participating therein by his presence . . . shall be guilty of a gross misdemeanor" (Italics added).

Appellees' authority to invoke this particular state statute is derived from Title 18 U.S.C.A. 7, 13.

The vice of R.C.W. 9.27.060(2), is in purporting to hold unlawful actions that have constitutional protection, if by the exercise of these actions there is a breach of the public peace.

The United States Supreme Court in a series of decisions has addressed itself to problems created by similar statutes. In *Stomberg v. California*, 283 U.S. 359, 369, Chief Justice Hughes expounded the underlying rationale for striking down such legislation, stating:

> "The maintenance of the opportunity for free political discussion to the end that the government may be responsive to the will of the people and that change may be obtained by lawful means, an opportunity essential to the security of the Republic is a fundamental principle of our constitutional system.
>
> "A statute which upon its face, and as authoritatively construed, is so vague and indefinite as to permit punishment of the fair use of this opportunity, is repugnant to the guarantee of liberty contained in the Fourteenth Amendment."

Another landmark decision in this area is *Terminiello v. Chicago*, 337 U.S. 1, 93 L.Ed. 1131, 69 S.Ct. 894 (1948). The defendant was tried and convicted for being in violation of the following city ordinance:

> "Code of Chicago, 1939, Sec. 193-1 . . .
>
> "All persons who shall make aid, countenance, or assist in making any improper noise, riot, disturbance, breach of the peace or diversion tending to a breach of the peace, within the limits of the city shall be deemed guilty of disorderly conduct . . ."

The trial court defined breach of the peace as "mis-

behavior which violates the public peace and decorum" and that the "misbehavior may constitute a breach of the peace if it stirs up the public to anger, invites dispute, brings out a condition of unrest, or creates a disburbance, or if it molests the inhabitants in the enjoyment of peace and quiet by arousing alarm."

In its consideration of this case the Supreme Court did not reach the question of whether the substance of Terminiello's speech was protected by constitutional guarantees, holding there was a preliminary question dispositive of the case. The court went on to state the following:

> "The vitality of civil and political institutions in our society depends on free discussion. As Chief Justice Hughes wrote in *DeJonge v. Oregon,* 299 U.S. 353, 365, it is only through free debate and free exchange of ideas that government remains responsive to the will of the people and peaceful change is effected. The right to speak freely and to promote diversity of ideas and programs is therefore one of the chief distinctions that sets us apart from totalitarian regimes.
>
> "Accordingly, a function of free speech under our system of government is to invite dispute. It may indeed best serve its high purpose when it induces a condition of unrest, creates dissatisfaction with conditions as they are, or even stirs people to anger. Speech is often provocative and challenging. It may strike at prejudices and preconceptions and have profound unsettling effects as it presses for acceptance of an idea.
>
> "That is why freedom of speech, though not absolute, *Chaplinsky v. New Hampshire,* 315 U.S. 368, is nevertheless protected against censorship or punishment, unless shown likely to produce a clear and present danger of a serious substantive evil that rises far above public inconvenience, annoyance or unrest.

> See *Bridges v. California,* 314 U.S. 352, 362; *Craig v. Harney,* 331 U.S. 367, 373. There is no room under our constitution for a more restrictive view. For the alternative would lead to a standardization of ideas either by legislatures, courts, or dominant political or community groups.
>
> "The ordinance as construed by the trial court seriously invades this province. It permitted conviction of petitioner if his speech stirred people to anger, invited public dispute, or brought about a condition of unrest. A conviction resting on any of those grounds may not stand."

More recently in several cases involving civil rights demonstrations, the court has reaffirmed the position espoused in *Stomberg* and *Terminiello, supra.*

In *Edwards v. South Carolina,* 372 U.S. 229, 9 L.Ed.2d 697, 83 S.Ct. 680 (1963), the defendants were convicted of the common law crime of breach of the peace. The Supreme Court of South Carolina in affirming the convictions admitted the term breach of the peace was not susceptible of exact definition, but generally defined it as a violation of the public order by an act or conduct inciting violence or an act likely to produce violence, it not being necessary that the peace actually be broken to lay the foundation for the offense. Peace was defined as ". . . the tranquility enjoyed by citizens of a municipality or community where good order reigns among its members, which is the natural right of all persons in political society."

The petitioners (defendants below) contended that there was a complete absence of any evidence of the commission of this offense. The court, however, did not choose to entertain this contention. It stated rather at page 236:

"We do not review in this case criminal convictions resulting from the evenhanded application of a precise and narrowly drawn regulatory statute evincing a legislative judgment that certain specific conduct be limited or proscribed. If, for example, the petitioners had been convicted upon evidence that they had violated a law regulating traffic, or had disobeyed a law reasonably limiting the periods during which the state house grounds were open to the public this would be a different case. See *Cantwell v. Connecticut*, 310 U.S. 296, 307-308; *Garner v. Louisiana*, 368 U.S. 157, 202 (concurring opinion).

"As in the *Terminiello* case the courts of South Carolina have defined a criminal offense so as to permit conviction of the petitioners if their speech 'stirred people to anger, invited public dispute, or brought about a condition of unrest.' A conviction resting on any of these grounds may not stand."

Cox v. Louisiana, 379 U.S. 536, 13 L.Ed.2d 471, 85 S.Ct. 453 (1965), involved convictions for disturbing the public peace, obstructing public passages and courthouse picketing. The court's discussion of the breach of the peace conviction is most applicable to the instant case.

The court characterized La. Rev. Stat. Sec. 14:103:1 Cum. Supp. 1962, upon which the Breach of the Peace conviction rested, in the following manner:

"The statutory crime consists of two elements: (1) congregating with others, 'with intent to provoke a breach of the peace or under circumstances such that a breach of the peace may be occasioned, and (2) a refusal to move on after having been ordered to do so by a law enforcement officer.'

"While the second part of their offense is narrow and specific, the first element is not. The Louisiana Supreme Court, in this case, defined breach of peace as 'to agitate, to arouse from a state of repose, to

molest, to interrupt, to hinder, to disquiet.'"

The court once again chose to rest its decision on the unconstitutionality of the Louisiana statute rather than on the sufficiency of the evidence, stating at page 545,

> "As in *Edwards,* we do not find it necessary to pass on appellants contention that there was a complete absence of evidence so that his conviction deprived him of liberty without due process of law."

Using *Edwards v. South Carolina, supra,* and *Terminiello v. Chicago, supra,* as precedent the court reversed the conviction:

> "The Louisiana statute, as interpreted by the Louisiana Court, is at least as likely to allow conviction for innocent speech, as was the charge of the trial judge in *Terminiello.* Therefore, as in *Terminiello* and *Edwards* the conviction under this statute must be reversed as the statute *is unconstitutional in that it sweeps within its broad scope activities that are constitutionally protected free speech and assembly.* Maintenance of the opportunity for free political discussion is a basic tenent of our constitutional democracy. *Stromberg v. California,* 283 U.S. 359, 369. *A statute which upon its face, and as authoritatively construed, is so vague, and indefinite as to permit the punishment of the fair use of this opportunity is repugnant to the guarantees of liberty contained in the Fourteenth Amendment*" (Emphasis ours).

Most recently, in *Ashton v. Kentucky,* 384 U.S. 195, 16 L.Ed.2d 469, 86 S.Ct. 140 (1966), the Supreme Court again rejected the type of statute represented by R.C.W. 9. 27.060(2).

The defendant was here convicted of criminal libel. The trial court in defining criminal libel stated that among other things it included "any writing calculated

to create disturbances of the peace."

The court in reversing stated at page 200:

> "Convictions for breach of the peace where the offense was imprecisely defined were similarly reversed in *Edwards v. South Carolina* (citation omitted) and *Cox v. Louisiana* (citation omitted). These decisions recognize that to make an offense of conduct which is "calculated to create disburbances of the peace" leaves wide open the standard of responsibility. It involves calculations as to the boiling point of a particular person or a particular group, not an appraisal of the comments *per se*. This kind of criminal libel 'makes a man a criminal simply because his neighbors have no self-control and cannot refrain from violence.'
>
> "*Chaffee, Free Speech in the United States,* 151 (1954):
>
> "'Here as in the cases discussed above we deal with First Amendment rights. Vague laws in an area suffer a constitutional infirmity. When First Amendment rights are involved, we look even more closely lest, under the guise of regulating conduct that is reachable by the police power, freedom of speech and press suffer. We said in *Cantwell v. Connecticut, supra,* that such a law must be narrowly drawn as to prevent the supposed evil, 310 U.S. 30, 84 L.Ed. 1220, 128 A.L.R. 1352, and that a conviction for an utterance based on a common law concept of the most general and undefined nature, Id. at 308, 84 L.Ed. 1220, 128 A.L.R. 1352, could not stand.'"

In all of the above cited cases, the Supreme Court found that the statutes (or common law crimes in the cases of *Ashton v. Kentucky, supra,* and *Edwards v. South Carolina, supra),* as authoritatively construed by the highest court of the particular state was unconstitutional because it swept within its scope actions that demanded constitutional protection. There has been no

authoritative construction of R.C.W. 9.27.060(2), by the Washington Supreme Court. However, a careful reading of the statute can leave little doubt as to its ultimate effect.

The only phrase that might lend itself to varying judicial interpretation is "disturb the public peace." This particular phrase, however, has been defined in *Smith v. Drew,* 175 Wash. 11, 26 P.2d 1040 (1933):

> "The term breach of the peace is a generic term, and includes all violations of the public peace or order calculated to disturb the public tranquility enjoyed by citizens of the community. Illustrations are legion, and in many of them 'fighting or rioting' is not a necessary element at all."

This definition is the same as that propounded by the Illinois court in *Terminiello v. Chicago, supra,* and the Louisiana court in *Cox v. Louisiana, supra.*

The remaining phrases of this statute are not subject to dispute. The meaning of the phrase "whenever three or more persons shall assemble" is self-evident. The only problem presented by this particular phrase is evidentiary. The remaining phrase, "with intent to carry out any purpose," can only be read literally. One cannot engraft upon this phrase the limitation of "any purpose not protected by the Constitution of the United States." The constitutional validity of a law is to be tested, not by what has been done under it, but what may by its authority be done." *People v. Lawrence,* 68 Ariz. 242, 295 P.2d 4 (1956); *C. F. Hernandez v. Frohmitle,* 140 Cal. App.2d 133, 204 P.2d 854 (1949); *General Outdoor Advertising Company v. Goodman,* 128 Colo. 344, 262 P.2d 261 (1953); *High Point Surplus Company v. Pleas-*

ants, 264 N.C. 650, 142 S.E.2d 697 (1965).

This statute is aimed at the prevention of each and every act by three or more persons assembled together which breaches the public peace. It could be used by the authorities to break up an assembly of persons who arouse the temper of a community by expressing unpopular political views. It could suppress crowds gathering to see a sporting event if by their gathering they were noisy, blocked traffic or annoyed the homeowners who surround a stadium. A St. Patrick's Day parade in the wrong community could incite onlookers to violence.

The Washington Supreme Court had before it in the recent case of *City of Seattle v. Drew*, 70 Wn.2d 383, 423 P.2d 522 (1967), the following ordinance:

> "Seattle Ordinance No. 16046, Sec. 29 . . .
>
> "It shall be unlawful for any person wandering or loitering abroad, or abroad under other suspicious circumstances, from one-half hour after sunset to one-half hour before sunrise to fail to give a satisfactory account of himself upon the demand of any police officer."

This ordinance was fraught with many of the same deficiencies as R.C.W. 9.27.060(2). It was urged in defense of this statute that the good judgment of the police officers would prevent an unconstitutional application of this statute. Without in any manner considering the conduct of the individual charged, the court held the statute unconstitutional, and in response to the city's contention stated:

> "This assurance, however, does not save the ordinance because 'well intentioned prosecutors . . . do not neutralize the vice of a vague law.' *Baggett v. Bullitt,* 377 U.S. 360, 373, 12 L.Ed.2d 377, 84

> S.Ct. 1316 (1964). *The law should be so drawn as to make it inapplicable to cases which obviously are not intended to be included within its terms.* The Seattle ordinance imposes sanctions upon conduct that may not manifest an unlawful purpose and, therefore is violative of due process of law. The language of the ordinance is too broad, it is vague" (Emphasis ours).

Application of this same standard of R.C.W. 9.27.060 (2) leads to the conclusion that it too would be considered too vague and too broad by the Washington Supreme Court.

The focus of R.C.W. 9.27.060(2), is on the reaction of the community to the offender's action and not to the action itself. The danger of this type of legislation caused the Supreme Court to remark in *Cox v. Louisiana, supra,* at page 482: "Here again, as in *Edwards* this evidence showed no more than that the opinions which . . . (the students) were peaceably expressing were sufficiently opposed to the views of the majority of the community to attract a crowd and necessitate police protection. *Edwards v. South Carolina, supra,* 372 U.S. 237, 9 L.Ed.2d 703. Conceding this was so, the 'compelling answer . . . is that constitutional rights may not be denied simply because of hostility to their assertion or exercise.' *Watson v. Memphis* 373 U.S. 526, 535, 10 L.Ed.2d 529, 536, 83 S.Ct. 1314."

The true effect of R.C.W. 9.27.060(2), is to subject the exercise of free speech and free assembly to a majority vote. It effectively curtails all assertion of views that might bring forth an angry response. The government should not be permitted the use of this statute to further the prosecution of any offender.

Appellants do not contend in this brief that the particular acts of blocking the doorway of the Selective Service Office are acts that are entitled to constitutional protection. However, this is not a prerequisite to attacking R.C.W. 9.27.060(2), as being unconstitutional on its face. In *Ashton v. Kentucky, supra,* it was not contended that the defendant had constitutional license to accuse various individuals of mayhem, embezzlement, conspiracy to murder, and attempted bribery. The court simply examined the Kentucky court's definition of the crime of criminal libel and determined that it was possible to convict an individual who was asserting a constitutional right.

The court reversed Ashton's conviction without reaching the question of whether his particular writings were constitutionally protected.

In *NAACP v. Button,* 371 U.S. 415, 432, the Supreme Court set out the rationale for overturning statutes where the petitioner had not urged an infringement of his constitutional rights other than being prosecuted under the particular statute.

> "Furthermore, the instant decree may be invalid if it prohibits privileged exercises of First Amendment rights whether or not the record discloses that the petitioner has engaged in privileged conduct. For in appraising a statute's inhibitory effect upon such rights, this court has not hesitated to take into account possible applications of the statute in other factual contexts besides that at bar. *Thornhill v. Alabama,* 310 U.S. 88, 97, 98; *Winters v. New York, supra,* at page 518-520; *C. F. Staub v. City of Baxley,* 355 U.S. 313. It makes no difference that the instant case was not a criminal prosecution and not based on a refusal to comply with a licensing requirement. The objectionable quality of vagueness and overbreadth does not depend upon absence of fair notice

> to a criminally accused or upon unchanneled delegation of legislative power, *but upon the danger of tolerating, in the area of First Amendment Freedoms, the existence of a penal statute susceptible of sweeping and improper application. C. F. Marcus v. Search Warrant,* 367 U.S. 717, 733. These freedoms are delicate and vulnerable, as well as supremely precious in our society. The threat of sanction may deter their exercise almost as potently as the actual application of sanctions. *C. F. Smith v. California, supra,* at page 151-154; *Speiser v. Randall,* 357 U.S. 513, 526. Because First Amendment Freedoms need breathing space to survive, government may regulate in the area only with narrow specificity" (Emphasis ours).

Recently Justice Brennan in *Dombrowski v. Pfister,* 380 U.S. 479, 14 L.Ed.2d 22, 85 S.Ct. 1116 (1965), reaffirmed this same concept stating at page 486:

> "Because of the sensitive nature of constitutionally protected expression we have not required that all those subject to overbroad regulation risk prosecution to test their rights. For free expression—of transcendant value to all society, and not merely to those exercising their rights—might be the loser (cite omitted).
>
> "For example, *we have consistently allowed attacks on overly broad statutes with no requirement that the person making the attack demonstrate that his own conduct could not be regulated by a statute drawn with the requisite narrow specificity*" (Emphasis ours).

R.C.W. 9.27.060(2) has a "chilling effect" on the First Amendment freedoms of speech and assembly. In the hands of an ill-intentioned prosecutor it represents a grave danger to the exercise of these rights.

II.

There Was No Proof of Assembly by Either Defendant Irwin Hogenauer, or Defendant Sue D. Gottfried

Under R.C.W. 9.27.060(2) the necessary elements of the crime are (a) the assemblage of three or more persons; (b) with a common intent to carry out a purpose; (c) in such a manner as to disturb the public peace.

The testimony was that between the hours of 8:30 and 10:30 on that morning, there was a peaceful demonstration of approximately 200 young people, both outside and inside the Federal Office Building in Seattle, Washington, and that around 10:30 a.m. some seven or more people sat down so as to block the entrance of the Selective Service Office (Tr. 20-21, 30, 39, 58, 61-62, 74). The persons thus sitting there were removed by the police but individually returned repeatedly and sat down again in front of the Selective Service Office. Some of them were eventually arrested.

As to the defendants other than Mr. Hogenauer and Mrs. Gottfried, the testimony was that they sat down together with two or more persons in front of the door of the Selective Service Office in a manner such as to obstruct passage into the office (Tr. 33, 34, 53, 66, 67; Ex. 5).

As to Mr. Hogenauer and Mrs. Gottfried, no such evidence was presented. As to them, evidence was as follows: Inspector LaPoint, of the Seattle Police Department, testified that a group of people sat down in the hallway (Tr. 31), but he failed to testify that Mr. Hogenauer or Mrs. Gottfried were among them. Officers

Tanner and Husby testified that they took Mrs. Gottfried out of the building (Tr. 43, 80), and that at that time she was sitting in the doorway to the office (Tr. 44, 82-83), but they failed to state that anyone else was sitting there with her.

Officer Tripp testified that he assisted in the arrest of Mr. Hogenauer (Tr. 60), at a time when Inspector LaPoint and another officer were dragging him down the hallway (Tr. 78).

Officer Blackwood testified that he arrested Mr. Hogenauer, who was sitting blocking the doorway on the left-hand side of the Selective Service Office (Tr. 75), but failed to testify as to whether he was there by himself or with others. Thus, no oral testimony showed that either Mr. Hogenauer or Mrs. Gottfried (1) assembled with others, or (2) had a common purpose with others.

Exhibit 8 shows Mr. Hogenauer being removed from in front of the doorway. It also shows what appears to be legs of two other persons. There was no testimony as to the owners of those legs or whether the owners had "assembled" with Mr. Hogenauer to carry out any purpose in a manner to disburb the public peace. However, we can only speculate that the owners of the legs were participants in an assemblage or that Hogenauer had any intended purpose with them, or they with him. The statute requires "three or more persons [to] assemble . . . with the intention of carrying out any purpose in such a manner as to disturb the public peace." The exhibit does not show such, nor is there any other testimony to fill this gap in the proof.

It should be borne in mind that this is not a conviction for trespass or for breach of the peace, but for unlawful assemblage. Assemblage, in the terms of the statute, must be proved. If the Government chose to try these defendants in a consolidated trial, it was not relieved of proving the essential details of its case as against each individual defendant, to the same extent as if the trials were separate. This the Government failed to do as to Mr. Hogenauer and Mrs. Gottfired. Their convictions should be reversed.

III.

The Defendant Hogenauer's Failure to Stand Up at the Adjournment of Court Did Not Constitute Contempt of Court

The court, in a summary proceeding under Federal Criminal Procedure, Rule 42(a), adjudged defendant Hogenauer in contempt of court for refusal to obey the court's order to stand up for the adjournment of court at the end of the trial (R. 66-73). This refusal to rise took place directly after the court had given its oral opinion in which appellants were found guilty of unlawful assembly (R. 66-67). Several weeks later, the court sentenced Mr. Hogenauer to fifteen days' imprisonment therefor (R. 73). The reasons for defendant's failure to rise, appear to stem from a reluctance to paying allegiance to "forms and symbols," rather than from any attitude of disrespect toward the court or the United States (R. 57-58, 70). Whatever his reason for not rising we submit that it did not constitute contempt of court. It could not be said that his failure to rise at adjournment disrupted the hearing or obstructed court proceedings

or interfered with the administration of justice. The trial was over; the finding of guilt had been made. The only remaining act was to adjourn the court.

18 U.S.C. §401 defines the applicable provision of contempt as:

> "(1) Misbehavior of any person in [the Court's] presence or so near thereto as to obstruct the administration of justice.
>
> "(3) Disobedience or resistance to [the Court's] lawful command."

The most that could be said of defendant's conduct is that it was a failure to perform a ceremonial and customary act of respect to the court. It was not an affirmative act of insult to the court. To empower a court to require affirmative acts of respect by threat of jail is neither necessary to the process of justice nor conducive to the development of genuine respect. There is an inherent paradox in commanding respect by the threat of imprisonment.

We do not mean to imply that we applaud or support Mr. Hogenauer's failure to rise. We have risen appropriately in the past and expect to continue to do so. But we do so voluntarily and as an indication of our genuine respect for the judicial process—not from fear of fine or imprisonment. As this court said in *West Virginia State Board of Education v. Barnette*, 319 U.S. 624-671, 87 L.Ed. 1628 (1942), at pages 632-3:

> "A person gets from a symbol the meaning he puts into it, and what is one man's comfort and inspiration is another's jest and scorn."

and later, in a concurring opinion, at page 644:

> "Words uttered under coercion are proof of loy-

> alty to nothing but self-interest. Love of country must spring from willing hearts and free minds inspired by a fair administration of wise laws. . . ."

In the instant case, it may similarly be said that a gesture of respect for the court, compelled by a jail sanction, is a worthless act at best and at worst derogates from true respect for the seats of justice. The court's order to Mr. Hogenauer to stand for the purpose of showing his respect to the court was unnecessary and therefore under these circumstances beyond the power of the court. We submit that Mr. Hogenauer was not in contempt of court.

IV.

Summary Proceedings Under Rule 42(a) Were Not Warranted Here

The summary procedure permitted by Rule 42(a) permits a criminal sentence to be imposed with none of the procedural protections provided by the Constitution. In such a proceeding the court is the prosecuting witness, the prosecuting attorney, the jury, and the sentencing court. Even though the judge is the quasi-victim of the alleged contempt, he certifies as to what took place with no opportunity for the accused to contradict the certificate. This power is an awesome power not permitted to any other branch of the government. Because of this, its exercise has been limited to those situations where summary action is required to prevent the obstruction of justice. The court stated *In re McConnell,* 370 U.S. 230, 8 L.Ed. 434, 82 S.Ct. 1288 (1962), at page 233:

> "The statute under which petitioner was summarily convicted of contempt is 18 U.S.C. §401, which provides that:
>
> "A court of the United States shall have power

to punish by fine or imprisonment, at its discretion, such contempt of its authority, and none other, as—

"(1) Misbehavior of any person in its presence or so near thereto as to obstruct the administration of justice. . . .

"This section is based on an Act passed in 1831 in order to correct serious abuses of the summary contempt power that had grown up and was intended as a 'drastic delimitation . . . of the broad undefined power of the inferior federal courts under the Act of 1789,' revealing 'a Congressional intent to safeguard Constitutional procedures by limiting courts, as Congress is limited in contempt cases, to "the least possible power adequate to the end proposed." The exercise by federal courts of any broader contempt power than this,' we have said, 'would permit too great inroads on the procedural safeguards of the Bill of Rights, since contempts are summary in their nature, and leave determination of guilt to a judge rather than a jury.' And we held long ago, in *Ex parte Hudgings*, that while this statute undoubtedly shows a purpose to give courts summary powers to protect the administration of justice against immediate interruption of court business, it also means that before the drastic procedures of the summary contempt power may be invoked to replace the protections of ordinary constitutional procedures there must be an actual obstruction of justice:"

and at page 236:

"To preserve the kind of trials that our system envisages, Congress has limited the summary contempt power vested in courts to the least possible power adequate to prevent an actual obstruction of justice. . . ."

Similarly, in *Harris v. United States,* 382 U.S. 162, 15 L.Ed.2d 240, 86 S.Ct. 352 (1965):

"[1] Rule 42(a) was reserved 'for exceptional circumstances,' *Brown v. United States,* 359 U.S. 41, 54, 3 L.Ed.2d 609, 619, 79 S.Ct. 539 (dissenting opinion), such as acts threatening the judge or dis-

> rupting a hearing or obstructing court proceedings. *Ibid.* We reach that conclusion in light of 'the concern long demonstrated by both Congress and this court over the possible abuse of the contempt power,' *Ibid.*, and in light of the wording of the Rule. Summary contempt is for 'misbehavior' (*Ex parte Terry,* 128 U.S. 289, 314, 32 L.Ed. 405, 412, 9 S.Ct. 77), in the 'actual presence of the court.' Then speedy punishment may be necessary in order to achieve 'summary vindication of the court's dignity and authority.' *Cooke v. United States,* 267 U.S. 517, 534, 69 L.Ed. 767, 773, 45 S.Ct. 390. But swiftness was not a prerequisite of justice here."

Similar holdings are found in *Parmelee Transportation Co. v. Keeshin,* 292 F.2d 806 (C.C.A. 7, 1961); *United States of America v. Galante,* 298 F.2d 72 (C.C.A. 2, 1962).

In the instant case, there was no threat to the judge, nor disruption of a hearing. At most there was a failure of good manners toward the court. Swiftness was not a prerequisite of justice here. If there was anything contemptuous in Mr. Hogenauer's conduct, it could have been handled by the normal criminal procedures. The fact that the alleged contempt occurred on December 26, 1967, and the sentencing was ordered January 19, 1968 (R. 66, 68), is indicative of the absence of any need for swiftness. Moreover, as was pointed out earlier, the trial of the defendants had been concluded, and the finding of guilt had been rendered. Justice was in no way obstructed by Mr. Hogenauer's failure to rise. Summary action was not required by the situation and not authorized by Rule 42(a).

CONCLUSION

R.C.W. 9.27.060(2) being unconstitutional on its face, the conviction of each of the appellants should be re-

versed and the U.S. District Court for the Western District of Washington, Northern Division, be directed to dismiss the government's complaint.

The charges against appellants Gottfried and Hogenauer should be dismissed because of appellee's failure to establish that either appellant was assembled with others or had a common purpose with others.

The conviction of the appellant Hogenauer for contempt of court should be reversed in that the actions of appellant were not obstructive of court procedure or interfered with the administration of justice.

Respectfully submitted,

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Attorneys for Appellants

CERTIFICATE

I certify that, in connection with the preparation of this brief, I have examined Rules 18, 19 and 39 of the United States Court of Appeals for the Ninth Circuit, and that, in my opinion, the foregoing brief is in full compliance with those rules.

RONALD J. MELTZER
Of Attorneys for Appellants

APPENDIX A

Table of Exhibits*

Plaintiffs:

Number	*Offered*	*Admitted*	*Rejected*
3	13	16	
4	16	39	
5	16	39	
6	44		93
7	46		93
73		76	

*All page references are to the transcript.

UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

PETER F. COMSTOCK; ANN FETTER; SUE D. GOTTFRIED; IRWIN R. HOGENAUER; and SELMA WALDMAN, Appellants, vs. UNITED STATES OF AMERICA, Appellee.	NO. 22631

BRIEF OF APPELLEE

Appeal from the United States District Court
for the Western District of Washington
Northern Division
Honorable William T. Beeks
District Judge

EUGENE G. CUSHING
United States Attorney

JOHN M. DARRAH
Assistant United States Attorney

1012 U. S. Courthouse
Seattle, Washington 98104

SUBJECT INDEX

SUBJECT INDEX

Page

OTHER REFERENCES:

ISSUES PRESENTED

1. Is RCW 9.27.060(2) constitutional?

2. Is the evidence sufficient to convict the appellants Hogenauer and Gottfried under this ordinance?

3. Were summary contempt proceedings warranted for appellant Hogenauer?

COUNTERSTATEMENT OF THE CASE

The Government accepts appellants' statement of the case with the following exceptions:

The testimony of arresting officers (Tanner Tr. 43, 44, Tripp Tr. 60, 78, Blackwood Tr. 75, Husby Tr. 82-83) and the police inspector in charge (Tr. 31, 34-38) together with pictures entered into evidence (Ex. 4 & 8) show that appellants Gottfried and Hogenauer were assembled with others in blocking the doorway to the Selective Service Office.

SUMMARY OF ARGUMENT

1. (a) Statutes using breach of the peace as a criminal standard have been held unconstitutional only when the State Court interpretation of that standard is so broad as to include constitutionally protected conduct.

   (b) RCW 9.27.060(2) has never been interpreted by the Washington Supreme Court and the Federal Courts are not warranted in presuming that the Washington Courts would place an impermissibly broad construction thereon.

2. Appellant Hogenauer's conduct at the adjournment of court constituted contempt by reason of its obstruction of the administration of justice in the Court's presence.

3. The disruptive and unprecedented conduct of appellant Hogenauer was properly dealt with by the summary contempt procedure of Rule 42(a).

ARGUMENT

I

RCW 9.27.060(2) IS NOT IMPERMISSIBLY BROAD OR VAGUE

A. In considering the constitutionality of a statute involving "breach of the peace" as a standard of conduct, the construction by the State Courts of this phrase is determinative.

Perhaps the best and most recent example of the proposition that the State Court construction of a statute or ordinance governs its constitutional consideration is Shuttlesworth vs. Birmingham, 382 US 87, 86 S.Ct. 211, 15 L.Ed. 2d, 176. In this case a Birmingham ordinance appeared on its face to permit a police officer to determine whether persons might lawfully stand on a sidewalk. However, the Court noted that the Alabama Court of Appeals had authoritatively ruled that the ordinance applied only when a person obstructs free passage on the street or sidewalk and then refuses to obey the officer's command. Said the Court:

> It is our duty, of course, to accept this State judicial construction of the ordinance. Winters v. New York, 33 US 507; U. S. vs. Burnison, 339 US 87; Aero-Mayflower Transit Co., the Board of Railroad Comm'rs, 332 US 495. As so construed, we cannot say that the ordinance is unconsitutional, though it required no great feat of imagination to envisage situations in which such an orainance might be unconstitutionally applied.

In the cases cited by appellant in which the United States Supreme Court holds unconstitutional statutes in some way similar to the unlawful assembly statute at issue here,

the high court has not held that breach of the peace or similar phrases are unconstitutionally broad, but rather that the definitions placed on such phrases by the State Courts make them so.

In Terminiello vs. Chicago, 337 US 1, 69 S. Ct.894,93 L.Ed. 1131, (1948), the defendant had been convicted under a disorderly conduct ordinance of the City of Chicago reading as follows:

> All persons who shall make a aid, countenance, or assist in making any improper noise, riot, disturbance, breach of the peace, or diversion tending to a breach of the peace, within the limits of the City . . .shall be deemed guilty of disorderly conduct . . .

The trial court, as affirmed by the Illinois Supreme Court, charged the jury that breach of the peace constitutes any

> Misbehavior which violates the public peace and decorum . . .

and that the

> Misbehavior may constitute a breach of the peace if it stirs the public to anger, invites dispute, brings about a condition of unrest, or creates a disturbance, or if it molests the inhabitants in the enjoyment of peace and quiet by arousing alarm.

The United States Supreme Court noted the function which free speech plays in our system of government including inducing unrest, creating dissatisfaction and having unsettling effects on established ideas. Noting the protected place given to free speech by the Constitution, the Supreme Court went on to state:

> The ordinance as construed by the trial court seriously invaded this province. It permitted conviction of petitioner if his speech stirred people to anger, invited public dispute, or brought about a condition of unrest. A conviction resting on any of those grounds may not stand.

In Edwards v. South Carolina, 372 US 229, 9 L.Ed. 2d, 697, 83 S.Ct. 680 (1963), not only was the crime of which the defendants were convicted not to be found in the statute books but the Supreme Court of South Carolina held that it was not susceptible to precise definition. The peace which the defendants breached was defined as:

> . . . the tranquillity enjoyed by citizens of a municipality or community where good order reigns among its members. . ..

Said the Supreme Court

> And they were convicted upon evidence which showed no more than that the opinions which they were peaceably expressing were sufficiently opposed to the views of the majority of the community to attract a crowd and necessitate police protection.

To the extent that Edwards represents the striking down of a criminal standard as being unconstitutional on its face, the Supreme Court states:

> As in the Terminiello case, the courts of South Carolina have defined a criminal offense so as to permit conviction of thepetitioners if their speech "stirred people to anger, invited public dispute, or brought about a condition of unrest."

In Cox vs. Louisiana, 379 US 536, 13 L.Ed. 2d, 471, 85 S.Ct. 453 (1965), a similar situation arose. A breach of the peace statute was construed by the Louisiana Supreme Court as meaning:

> to agitate, to arouse from a state of repose, to molest, to interupt, to hinder, to disquiet.

Said the Supreme Court:

> The Louisiana statute, as interpreted by the Louisiana Court, is at least as likely to allow conviction for [illegible] as was the charge of the trial judge in Terminiello.

In the case of Keyton vs. Kentucky, 384 US 195, 16 L.Ed. 2d, 469, 86 S.Ct. 140 (1966), involved a criminal libel statute, which, although unlike the unlawful assembly statute of Washington, was interpreted by the trial court to broaden the standard of breach of the peace. The Kentucky Court of Appeals, although affirming the conviction, eliminated the element of breach of the peace from this crime. The United States Supreme Court held that where an accused is convicted under an unconstitutional standard, an appellate court cannot salvage the conviction by changing the standard to eliminate the unconstitutional features. Thus, the Kentucky conviction was reversed because it still rested upon a definition which was impermissibly broad.

United States vs. Jones, 365 F.2d 675 (2 Cir. 1966), is a case arising much like the case at bar in which the interpretation of a State statute was at issue. Jones and others chained themselves so as to block the three front entrances to the United States Courthouse at Foley Square in New York City. They were charged with violation of Title 18 U.S.C., Section 7 and 13, and Section 722(2) of the New York Penal Law

> [illegible] person who [illegible] to provoke a breach of the peace, or [illegible] a breach of the peace may be occasioned, commits any of the following acts shall be deemed to have committed the offense of disorderly conduct: . . .
>
> 2. Acts in such a manner as to annoy, disturb, [illegible] or be offensive to others . . . .

Defendants attacked the statute on the grounds that it was unconstitutionally vague on its face relying on Cox vs. Louisiana, supra. Following the direction of Shuttlesworth vs. Bullingham, supra, the Second Circuit Court of Appeals examined decisions of the New York Court of Appeals construing the statute. From a review of these cases it determined that the statute had not been interpreted so as to sweep within its terms constitutionally protected activity. In affirming the convictions the Court stated at page 678:

> By direct contrast to Cox there is no reason to believe that Section 722(2) as construed by the highest Court of New York State would "allow persons to be punished merely for peacefully expressing unpopular views."

B. Federal Courts will not presume an impermissibly broad construction of a state statute.

As conceded by the appellant on pages 11 and 12 of his brief, the Washington Supreme Court has never had occasion to construe RCW 9.27.060(2).

Last year the Seventh Circuit Court of Appeals had occasion to consider this precise issue in a case quite similar to the instant case. In United States vs. Woodard,

371 F.2d 136 (7 Cir. 1967), the Court reviewed the conviction of persons creating disorder at hearings of the House Un-American Activities Committee in Chicago. Both were charged under the disjunctive Illinois statute, as in Jones, supra, and Section 26-1(a) of Chapter 38 of the Illinois Revised Statutes:

> A person commits disorderly conduct when he knowingly . . . does any act in such unreasonable manner as to alarm or disturb another and to provoke a breach of the peace.

The Court found no construction of the statute by any Illinois Court. Said the Court at page 143:

> The defendants' conduct was not constitutionally protected and the statute was properly and narrowly applied. It cannot be contended that the Illinois statute is unconstitutionally infirm for the reason that it may possibly be misapplied to include protected activity. We have no warrant to assume that the Illinois Courts will construe the statute improperly or that they will not interpret the statute as we have done. The State Courts are as firmly bound by the Constitution as the Federal Courts.

With regard to the standard given by the statute, the Court said at page 140-1:

> The Constitution does not require impossible standards of specificity in penal statute. It requires only that the statute convey 'sufficiently definite warning as to the proscribed conduct when measured by common understanding and practices' (citation omitted). When measured by this criterion, Section 26-1(a)(1) of the Illinois Disorderly Statute does not offend due process.
>
> . . ."Common sense . . . dictate(s) that . . . conduct is to be adjudged to be disorderly not merely because it offends some supersensitive

or hypercritical individual but because it is, by its nature, of a sort that is a substantial interference with (our old friend) the reasonable man' (citation omitted). In short, we think the Illinois Statute, 'when measured by common understanding and practices' (citation omitted) provided the defendants with adequate warning that their conduct was prohibited."

Appellants at page 12 of their brief urge that the Washington State Statute in question must be read to be impermissibly broad and unconstitutional. It is asserted that this result can be reached by reason of a definition of disturbing the peace found in Smith vs. Drew, 175 Wash. 11, 26 P 2d 1040, (1933). That case is an action for civil damages. The date of decision clearly indicates that the Supreme Court of Washington did not have at that time any instruction from the United States Supreme Court on the Constitution's requirements in this area. Indeed, the case of City of Seattle vs. Drew, 70 Wash. 2d 383, 423 P 2d 522 (1967), cited by appellants, indicates the Washington Supreme Court is fully responsive to the requirements of the Constitution and would not give an impermissibly broad interpretation.

In Ashton, the Supreme Court said:

Conviction for breach of the peace where the offense was imprecisely defined were similarly reversed in Edwards vs. South Carolina. (citation omitted) and Cox vs. Louisiana (citation omitted). These decisions recognize that to make an offense of conduct which is 'calculated to create disturbances of the peace' leaves wide open the standard of responsibility. It involves calculations as to the boiling point of a

particular person or a particular group, not an appraisal of the common per se. This criminal libel 'makes a man a criminal simply because his neighbors have no self-control and cannot refrain from violence' (citation omitted). 384 U.S. at page 200.

Would the Washington Supreme Court in 1968 construe breach of the peace as did its sister courts in South Carolina and Louisiana? Like the Seventh Circuit in Jones, this Court has no warrant to assume that it would.

II.

SUBSTANTIAL PROOF EXISTED THAT APPELLANTS HOGENAUER AND GOTTLIEB WERE ASSEMBLED AT THE TIME OF THE COMMISSION OF THE CRIME

Exhibit 3, being a letter addressed to Draft Board No.3 purportedly signed by appellant Hogenauer stated in part as follows:

> On Tuesday, October 17, 1967, at 10:30 a.m., the Seattle Civil Action Committee will begin interfering with the operation of Draft Board No. 3, King County. Under a group Discipline of Non-violence some participants will obstruct the entrance of your office.

(The receipt of this and other similar letters is explained by Mrs. Conner, Tr. 14-15). That the sit-in proceeded as described in this letter can be seen from the following testimony of Inspector LaPointe:

> I went into the area of the Selective Service Office and was in that Selective Service Office area when a group of people came down the hallway that leads into the Selective Service offices and sat down in this antercom just outside the doorway to the offices and

[illegible] (Tr. 34) . . . I recall the officers who were there with me [illegible] them. . . . He remained about seven or [illegible] at that time. . . . I remember Mr. [illegible] officer. He was talking as he explained why we were there and he was [illegible] to be arrested. . . . All [illegible] arrested and I remember that I was arrested. (Tr. 35-36) [illegible] that we were going to be arrested. [illegible] were removed. [illegible] and then were removed. [illegible] were placed under arrest, [illegible] or nearly as I [illegible] their names or address. I tried to keep control [illegible] how many times I had been [illegible] on the third time I told them that [illegible] were under arrest, that they had chosen to be [illegible] removed, and they were under arrest [illegible]. (Tr. 37) And I again asked if they had a [illegible] walking and when they refused they were [illegible] forcibly. (Tr.38)

At the time Mr. Foster [illegible] spoke of Mr. Hogenauer, he was requested to [illegible] in the courtroom. The appellants were observed [illegible] the crowded courtroom and not sitting at counsel table (Tr. 14) and the witness picked out a man who was not involved in the case at all. Nonetheless, his testimony shows that he maintained his station at the entrance to the Selective Service Office and viewed the entire performance from the time the group first began the sit-in until the last arrest was made and that he direct-

Under these circumstances as long as there was an initial assembly of persons in the doorway it is not necessary that each individual appellant be shown to have been arrested while seated in the presence of two of his co-appellants. As long as the assembly occurred, it is sufficient that a defendant is arrested while sitting in the doorway whether he is the last one of the seven to be carried out or whether he is the first one to return to the doorway after having been already carried out. Each appellant here was identified as having been arrested while sitting at the doorway during the same period of time.

It is idle for the appellants to argue in their brief at page 18 that the owners of legs visible behind Mr. Hogenauer in Exhibit 8 were not shown to have any purpose in common with this appellant. Their behavior was identical and the intent or purpose, aside from what Mr. Hogenauer may have put in writing (Ex. 3), can only be determined from their actions. In fact, appellants Waldman and Fetter are identifiable as those to whom the legs, clothing, and pocketbook belong in Exhibit 8. Similarly with appellant Gottfried in Exhibit 4.

While Mrs. Gottfried was not identified as appearing in Exhibit 4 her activity is detailed by Officer Husby as follows:

> Well, to begin with I saw her carried out once. I heard the officer give her notice not to come

back in. This was in her presence. She went - - I went back in. She tried to get back in. I went back in and asked the Inspector if it was all right if we let her in and he said yes, so we let her back in again. She went in, in front of 901, sat down across the door with her - - -

Question, what is 901, sir?

Answer: That is the Selective Service place there . . . the Inspector told her that she would have a choice, she could get up and go out, otherwise she was under arrest and we would have to take her out, and she said she understood and she refused to go out. (Tr. 82-83)

III.

APPELLANT HOGENAUER'S CONDUCT AT TIME OF ADJOURNMENT OF COURT AT THE END OF TRIAL CONSTITUTED CONTEMPT OF COURT.

Not only did appellant Hogenauer refuse to rise as acknowledged in appellants' brief but he refused to rise when requested to do so, refused to come forward under his own power, requiring the Marshal to forcibly bring him before the Court, and finally went limp and fell to the floor, lying prostrate as the Court addressed him. See the Certificate of Contempt filed by the Court subsequent to the occurrence of this event.

According to Title 18 U.S.C., Section 401, the Court may punish as contempt:

> Misbehavior of any person in its presence or so near thereto as to obstruct the administration of justice.

Appellants' brief, referring only to the act of remaining seated, stated:

> It was not an affirmative act of insult to the Court. (Appellants' brief, page 20)

It also argues that since the trial was over and nothing remained but to adjourn Court, the act could not be said to disrupt the hearing or obstruct Court proceedings.

The standard by which contempt is judged is the obstruction of the administration of justice. It is submitted that the preservation of order in the courtroom with a minimum amount of decorum is essential to the administration of justice. Attorneys well know that they must stand when addressing the Court, that they must adopt a certain minimum standard of dress, and that they must abide by certain rules of conduct while present in the courtroom.

While not as familiar as the lawyer with courtroom conduct, a defendant or witness knows that he may not wear a bathing suit, may not speak at any time the spirit moves him, and may not lounge on the benches or sit on the tables. He knows this not because it is written down as a rule but because of his knowledge of the dignity which society has accorded to this branch of the Government. This dignity is achieved in part by promoting respect for the Judge by depersonalizing and impartializing his role. We speak of the Judge as "The Court," thus symbolizing his institutional role.

In the transcript of the proceedings in this matter attached to the Certificate of Contempt it is shown that appellant Hogenauer stated ". . . I don't rise for any man." While the respect that is shown to the Court symbolizes the importance and solemnity of the role given it by society, the court's business must be administrated and carried out by human beings. Whether he intends to withhold respect from the man or the institution, his action is no less a contempt.

Appellants' brief urges that since the proceedings were over and nothing remained but the adjournment of court, no obstruction of justice took place. Would there then have been an obstruction had Mr. Hogenauer failed to rise at the opening of Court? Such an individual act might not be noticed but what of the refusal to rise by a large portion of those in the courtroom who may disagree with the law or the Judge's interpretation of it? Is justice obstructed when a defendant or a witness addresses the Judge by his first name or a nickname, or does the obstruction only come by reason of laughter from the spectators? One can pose any number of situations which, though minor, could disrupt or embarrass. Such considerations must inevitably lead to the conclusion that the decorum of the courtroom is an essential element of the administration of justice, and the trial judge's control of the courtroom extends at the very least to the entire time he is present in the courtroom. Necessity requires that discretion

be reposed in the Court to act in a reasonable manner, as the situation requires. The Congressional enactment and the case law permit this.

When a claim of religious conscience is asserted to support a refusal to stand in the courtroom it will be time to consider case of West Virginia State Board of Education vs. Barnette, 319 US 624, 63 S.Ct. 1178, 87 L.Ed. 1628 (1942), as urged by appellants. Persons desiring to inject into court proceedings their own individual stamp of unusual conduct mock the freedom for which the Barnette case stands.

Previous cases in which the contempt power has been exercised because of acts committed in the presence of the court are few and far between. Conduct of defendants and their counsel at Smith Act trials has been held contemptuous by reason of insolent words and actions. e.g., United States vs. Hall, 176 F.2d 163 (2 Cir. 1949), cert. den. 70 S.Ct. 90 (1949), and United States vs. Sacher, 182 F.2d 416, (2 Cir. 1950). The attempt to address the court contrary to the court's order by a narcotics conspiracy defendant, along with other aggravating circumstances, constituted contumacious conduct in United States vs. Gallante, 298 F.2d 72, (2 Cir. 1962). Unspecified open defiance of the trial judge along with other arrogant behavior of a litigant proceeding pro se was held contemptuous in In Re DuBoyce, 241 F.2d 855, (3 Cir. 1957).

These cases, and others of which they appear to be representative, do not involve symbolic acts such as the failure to rise in the case of appellant Hogenauer. It would appear that such conduct has never been attempted in a court before. Appellee's research finds no similar conduct in either the State or Federal system. The fact that the conduct is passive rather than aggressive, as in the other cases, should not be a meaningful distinction. Appellant Hogenauer's act of sitting down in the Selective Service office doorway was none the less obstructive because of his desire to protest the war in Vietnam. Similarly, his acts of sitting, refusing to rise, and falling to the floor were none the less disruptive because of his devotion to some "higher power."

If such conduct is put beyond the reach of the contempt power it would be extremely difficult for a trial judge to maintain dignity in a trial where strong feelings on social issues have arisen.

IV.

SUMMARY-CONTEMPT PROCEEDINGS UNDER RULE 42A WERE WARRANTED FOR APPELLANT HOGENAUER

Rule 42A of the Federal Rules of Criminal Procedure states that:

> A criminal contempt may be punished summarily if the judge certifies that he saw or heard the conduct constituting the contempt and that it was committed in the actual presence of the court.

Appellant's brief makes no contention that the rule was not complied with. Rather it makes two arguments.

First, it notes the Supreme Court statement in the case of In Re McConnell, 370 US 230, 82 S. Ct. 1288, 8 L.Ed. 2d 434 (1962), at page 236, that:

> Congress has limited the summary contempt power vested in courts to the least possible power adequate to prevent an actual obstruction of justice.

Nothing argued or cited by the brief on this point goes beyond the argument that Hogenauer's behavior did not constitute a contempt of court.

Second, it is argued that the contempt conviction is shown to be faulty by reason of a delay:

> The fact that the alleged contempt occurred on December 26, 1967, and the sentencing was ordered January 19, 1968, (R. 66, 68) is indicative of the absence of any need for swiftness. (Appellant's brief, 23)

The transcript of proceedings at the time of the contempt indicate that the trial court entered sentence immediately in the amount of thirty (30)days. The following day, Mr. Hogenauer was brought before the Court in the presence of his attorneys and the sentence was vacated pending reconsideration at the time scheduled for sentencing in the main criminal proceeding. No prejudice occurred to appellant Hogenauer by this procedure as reconsideration resulted in his sentence being cut in half, and it appears

he makes no objection of prejudice. The argument appears to be that by vacating the sentence and allowing the passage of twenty-three (23) days, the trial judge in some way confesses the insignificance of the contempt.

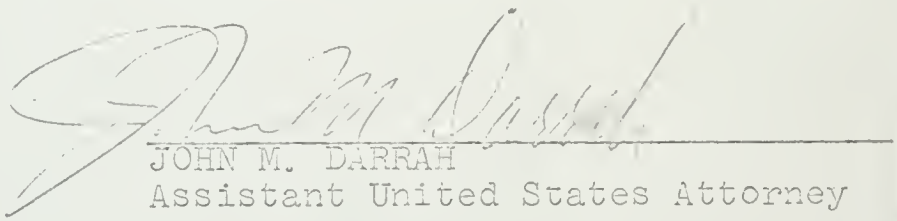
On the contrary, it is to the credit of the Court that he recognized the need for a time for reflection on what was a most unusual and unprecedented action.

CONCLUSION

For the reasons stated above, the Government respectfully urges that the constitutionality of RCW 9.27.060(2) be upheld, that sufficient evidence of the participation of appellants Hogenauer and Gottfried is found in the record, that appellant Hogenauer committed contempt and summary proceedings therefor were properly used, and that the conviction of all defendants should therefore be upheld.

Respectfully submitted,

EUGENE G. CUSHING
United States Attorney



JOHN M. DARRAH
Assistant United States Attorney

CERTIFICATION

I hereby certify that, in connection with the preparation of this brief, I have examined Rules 28 and 32 of the Federal Rules of Appellate Procedure and that, in my opinion, the foregoing brief is in full compliance with those rules.

JOHN M. DARRAH
Assistant United States Attorney

DATED at Seattle, Washington, this 23d day of July 1968.

No. 22631

IN THE

United States Court of Appeals
For the Ninth Circuit

PETER F. COMSTOCK; ANN FETTER; SUE D. GOTTFRIED;
IRWIN R. HOGENAUER and SELMA WALDMAN,
Appellants,

v.

UNITED STATES OF AMERICA,
Appellee.

APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF WASHINGTON,
NORTHERN DIVISION

HONORABLE WILLIAM T. BEEKS, *Judge*

REPLY BRIEF OF APPELLANTS

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TABLE OF CONTENTS

TABLES OF AUTHORITY

Table of Cases

Statutes

IN THE

United States Court of Appeals For the Ninth Circuit

PETER F. COMSTOCK; ANN FETTER; SUE D. GOTTFRIED; IRWIN R. HOGENAUER and SELMA WALDMAN,
Appellants,

v.

UNITED STATES OF AMERICA,
Appellee.

APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE WESTERN DISTRICT OF WASHINGTON, NORTHERN DIVISION

HONORABLE WILLIAM T. BEEKS, *Judge*

REPLY BRIEF OF APPELLANTS

ARGUMENT IN REPLY

I. The Federal Court Should Determine the Constitutionality of R.C.W. 9.27.060(2) Despite the Absence of a State Court Construction

Appellee raises only one point in defense of the court's denial of appellants' motion to dismiss on the grounds of the unconstitutionality of R.C.W. 9.27.060(2), i.e., that in the absence of a state court construction of the stat-

ute, one must assume a constitutional interpretation.

There are several cogent reasons why appellee's argument is untenable.

First, appellee has ignored the fact that we are concerned with a Federal statute, not a State statute. Under the terms of 18 U.S.C.A. §13, the Federal Government specifically adopts portions of the State Criminal Code and makes them applicable to various areas of Federal control as defined in 18 U.S.C.A. §7. These portions of the State Criminal Code then become Federal law. As such, construction of these laws is controlled by Federal decisions rather than State decisions. A case in point is *McCoy v. Penco,* 145 F.2d 260 (1944, 8th Cir.). There the defendant who had been charged under the predecessor to 18 U.S.C.A. §13 contended on appeal that the indictments were defective under Texas decisions construing the particular State statute. The court stated at page 262:

> "The Texas decisions are not controlling. Prosecutions under 18 U.S.C.A. §468 are not to enforce the laws of the state, territory or district, but to enforce federal law, the details of which instead of being recited, are adopted by reference." *People of Puerto Rico v. Shell Co.,* 302 253, 266; 58 S.Ct. 167, 173; 82 L.Ed. 235.

A similar contention was raised by the defendant in the more recent case of *Smayda v. United States,* 352 F.2d 251, 253 (1965). In response, the court stated:

> "The Assimilative Crimes Act creates a federal offense, it refers to the California statutes for its definition and penalty; but it does not incorporate the whole criminal and constitutional law of California."

In the face of this language, appellee's suggestion that the Federal court has no warrant to assume the Washington Supreme Court would hold the statute unconstitutional, is clearly untenable. The Federal court has a Federal statute before it and must concern itself with its constitutionality.

Any court construing this statute must conclude that it prevents the exercise of constitutionally protected rights. On page 13 of appellants' opening brief were set out various protected activities which could be prohibited by this statute. Appellee never met appellants' contention and instead chose to quibble on the definition of the term "breach of the peace."

While appellee was correct in stating the Washington court in *Smith v. Drew,* 175 Wash. 11, 20 P.2d 1040 (1933), had no constitutional question before it when they defined breach of the peace, it is equally as correct to state that the definition they arrived at is the same reached by all of the state courts involved in the decisions cited in appellants' opening brief. There is no reason to assume breach of the peace has any other meaning.

R.C.W. 9.27.060(2) purports to measure a violation by the temper of the particular community. The danger of this type of statute is aptly characterized by Mr. Justice Black in his concurring opinion in *Cox v. Louisiana,* 379 U.S. 536, 13 L. Ed.2d 471, 85 S. Ct. 453 (1965). After stating the Louisiana statute was invalid because it was not sufficiently narrowly drawn to assure non-discriminatory application, he stated at page 579:

> "In the case before us Louisiana has by a broad, vague statute given policemen an unlimited power to

> order people off the streets, not to enforce a specific, non-discriminatory state statute forbidding patrolling and picketing, but rather whenever a policeman makes a decision on his own personal judgment that views being expressed on the street are provoking or might provoke a breach of the peace. Such a statute does not provide for government by clearly defined laws, but rather for government by the moment to moment opinions of a policeman on his beat." (Cite omitted.)
>
> "This kind of statute provides a perfect device to arrest people whose views do not suit the policeman or his superiors, while leaving free to talk anyone with whose views the police agree."

Even granting appellees' contention that there is a rule of law that Federal courts should assume that the Washington court will not give a statute an unconstitutional interpretation, such rule is not applicable when the statute involves itself with First Amendment freedoms.

This very problem was dealt with by the Second Circuit in *Wolff v. Selective Service Local Board No. 16,* 372 F.2d 817 (1967), a case involving the reclassification of individuals who had engaged in various protests concerning the Selective Service system. The court stated at page 824:

> "Where basic constitutional rights are imperiled, the courts have not required a series of injured parties to litigate the permissible scope of the statute or administrative interpretation, but have nullified the unconstitutional action and required the Government to start in the first instance with a statute or interpretation that will not so overhang free expression that the legitimate exercise of constitutionally protected rights is suppressed."

It is interesting to note that this decision comes from the same circuit as *United States v. Jones,* 365 F.2d 675 (1966), a case heavily relied upon by appellee.

Another cogent comment upon this problem was made by the Supreme Court in connection with the so-called "abstention" doctrine in *Baggett v. Bullitt,* 377 U.S. 360, 375, 12 L. Ed.2d 377, 84 S. Ct. 1316 (1964). Here the court stated in response to respondents' argument that the court should await a constitutional determination by the state courts:

> "We are not persuaded. The abstention doctrine is not an automatic rule applied whenever a federal court is faced with a doubtful issue of state law; it rather involves a discretionary exercise of a court's equity power."

The court then went on to list the considerations which militated against the application of that doctrine. Included among them were that the particular statute was open to an indefinite number of interpretations, that the constitutional issue is not subject to resolution in one litigation, and that the resultant piecemeal adjudication inhibits the exercise of First Amendment freedoms for an undue length of time. All of these considerations are present in the instant case.

A State court determination on the instant facts might lead to a determination that the appellants were not asserting constitutional rights. It would not reach the question of whether the myriad of borderline activities were or were not to be included in this statute's prohibitions. As the Supreme Court stated at page 378 in *Baggett v. Bullitt, supra*:

> "It is fictional to believe that anything less than extensive adjudications, under the impact of a variety of factual situations, would bring the oath within the bounds of permissible constitutional certainty. Abstention does not require this."

The free exercise of First Amendment rights is too vital to await the long and arduous procedure of obtaining a construction of this statute through numerous State Supreme Court decisions.

Appellee has asked this court to refrain from making a constitutional determination. It is clear that under the criteria set out in the *Wolff* and *Baggett* cases, *supra,* in the instant case it would result in a severe curtailment of the expression of First Amendment freedoms. The burden on the Government to enact well-defined, narrow statutes is slight when compared to danger of the infringement of Constitutional rights.

II. No Evidence of Assembly as to Appellants Hogenauer and Gottfried

To indicate evidence supporting the conviction of Appellant Hogenauer, the Government quotes at length (and out of full context) Inspector LaPointe's testimony as to the gathering and seating of some unnamed people across the entrance to the Selective Service office. As to this, it is sufficient to quote the court's comment regarding this testimony (Tr. 71):

> "MR. DARRAH: . . . Inspector LaPointe testified that Hogenauer—
>
> "THE COURT: I am not going to consider the inspector's testimony at all as to Mr. Hogenauer."

This was because the inspector, when asked to identify Mr. Hogenauer in the courtroom, had pointed out an unrelated onlooker and had been totally unable to identify Mr. Hogenauer (Tr. 36-37). Thus, the Government can

hardly rely on LaPointe's testimony to support the conviction.

However, even if we were to accept the inspector's partially quoted testimony as true, he gave not a scintilla of evidence that Mr. Hogenauer assembled with two or more other persons in a manner to disturb the peace.

Similarly, the testimony relied on by appellee to convict Appellant Gottfried made no mention of assemblage with two or more other persons. It merely described her arrest. The fact that both of these appellants were arrested is not evidence that they assembled with two or more persons in a manner to disturb the peace.

CONCLUSION

The Federal court has a duty to determine the constitutionality of R.C.W. 9.27.060(2) which became Federal law by virtue of the Government's use of the Assimilative Crimes Statute, 18 U.S.C.A. §§7, 13.

In any event, the inhibitory effect of this statute on the expression of First Amendment rights directs the Federal court to examine its constitutionality.

The testimony quoted by appellee to justify the convictions of Appellants Hogenauer and Gottfried demonstrated no evidence of an assemblage with two or more persons in a manner calculated to disturb the public peace.

Respectfully submitted,

Ronald J. Meltzer
Francis Hoague
Michael H. Rosen
Attorneys for Appellants

CERTIFICATE

I certify that, in connection with the preparation of this brief, I have examined Rules 18, 19 and 39 of the United States Court of Appeals for the Ninth Circuit, and that, in my opinion, the foregoing brief is in full compliance with those rules.

RONALD J. MELTZER
Of Attorneys for Appellants

No. 22633

IN THE

United States Court of Appeals

FOR THE NINTH CIRCUIT

INTALCO ALUMINUM CORPORATION,

Petitioner,

vs.

NATIONAL LABOR RELATIONS BOARD,

Respondent.

BRIEF OF INTALCO ALUMINUM CORPORATION.

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TOPICAL INDEX

V. Page

VI.

TABLE OF AUTHORITIES CITED

Miscellaneous

Statutes

Textbook

No. 22633

IN THE

United States Court of Appeals

FOR THE NINTH CIRCUIT

INTALCO ALUMINUM CORPORATION,

Petitioner,

vs.

NATIONAL LABOR RELATIONS BOARD,

Respondent.

BRIEF OF INTALCO ALUMINUM CORPORATION.

Jurisdiction.

Jurisdiction is founded on the existence of a question arising under the provisions of the National Labor Relations Act, 29 U.S.C. §151 *et seq.,* and specifically §29 U.S.C. §158(a)(2) and 160(f) (hereinafter referred to as the Act). Jurisdiction was alleged in paragraphs 4 and 5 of the complaint [IR 10].*

Statement of Case.

Intalco Aluminum Corporation (hereinafter referred to as Appellant) operates a basic aluminum production facility near Ferndale, Washington.

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*Frequent reference will be made herein to the transcript of the record. The reference IR 10 refers to page 10 of volume one of that record. Reference will be made to exhibits as, for example, GC 2 and INT 3 which refers to General Counsel's Exhibit 2 and Intervenors Exhibit 3, respectively.

On March 10, 1966 the International Association of Machinists and Aerospace Workers, AFL-CIO (hereinafter referred to as the Machinists or Intervenor) advised petitioner that the Machinists represented a majority of petitioner's employees and demanded that petitioner recognize the Machinists. In support of its claim of majority status the Machinists offered to submit to a card check [GC 2]. The Machinists' demand was by letter and petitioner by letter agreed to meet and investigate the Machinists' claim and damand [GC 3].

On March 16, 1966, petitioner met with the Machinists and with two representatives of the Division of Industrial Relations of the Department of Labor and Industry of the State of Washington (hereinafter referred to as the State Labor Department). Agreement was reached upon the description of the production and maintenance unit and petitioner consented to a check of authorization cards of the Machinists by the State Labor Department [GC 4, 5, 6, 7]. Petitioner advised the State Labor Department that other labor organizations had expressed an interest in petitioner's employees [IIR 1097, 1098].

The State Labor Department conducted the check of authorization cards and certified that the Machinists had presented 81 valid authorization cards out of a total complement of employees in the agreed upon unit of 122 [GC 6, 7]. The authorization cards used in the check were clear and unambiguous authorizations on the part of the employees for the Machinists to represent them [INT 1]. The unambiguous nature of the authorization was underscored by the fact that on the top of the card in bold letters was the phrase "Yes I want the IAM" [INT 1].

Petitioner recognized the Machinists on March 17, 1967 by appropriate notices posted in the plant. Negotiations commenced shortly thereafter and an agreement was signed on April 14, 1966 [GC 11].

In July and November 1965 a representative of the United Steelworkers of America, AFL-CIO (hereinafter referred to as Steelworkers) advised petitioner that the Steelworkers intended to organize petitioner's employees [IIR 20-1, 2, 3]. The Steelworkers' organizing campaign did not become active until sometime in March when a trailer was located off the plant premises [IIR 27, 26]. The Steelworkers obtained few, in any, authorization cards prior to the 1st of March [INT 10, 25, 38, 5].

A representative of the Aluminum Workers International Union, AFL-CIO (hereinafter referred to as Aluminum Workers) also contacted Company representatives in December 1965 and announced that he was going to organize petitioner's employees [IIR 20]. The Aluminum Workers campaign was not active, however, until sometime after the first of the year 1966, the first card being obtained on January 24, 1966 [GC 9]. No outward manifestation of the Aluminum Workers campaign was made so that the public or petitioner would be aware of the campaign until the institution of legal proceedings as noted hereinafter.

The Bellingham Metal Trades Council, Allied Industries Division (hereinafter referred to as Metal Trades Council) engaged in minor organizational activities after March 1, 1966 and obtained only a limited number of authorization cards [INT 3A, 4, 13, 15, 17, 26, 30 and 37]. Most of the cards obtained by the Metal

Trades Council were dated after recognition was extended to the Machinists [INT 3A, 4, 13, 15, 17, 26, 30 and 37].

On March 18, 1966, the day after the recognition was extended to the Machinists, the Steelworkers, Aluminum Workers and Metal Trades Council filed unfair labor practice charges in Case Nos. 19-CA-3346, 3347 and 3348, respectively. The Aluminum Workers filed a petition for representation in Case No. 19-RC-3896. Hearing on the consolidated complaint followed.

The essential allegations of the consolidated complaint were that petitioner had given unlawful assistance to the Machinists in violation of Section 8(a)-(2) of the Act by recognizing the Machinists and by furnishing a list of names of employees to the Machinists.

The Trial Examiner specifically found that no unlawful assistance was given Intervenor [IR 51].

The Trial Examiner specifically found, and all of the findings of the Trial Examiner were affirmed by the Board, that there was "an absence of bad faith on the part of Respondent [Appellant]" [IR 50].

The Board found specifically that the agreement entered into by Appellant and the Machinists to consent to a cross check was recognition by the parties that a "question concerning representation" existed [IR 88]. The Board further found that other unions "then known by Respondent [Petitioner] and the Intervenor to be engaged in organizing the employees involved" were not given opportunity to participate in the cross check [IR 88]. This appeal followed.

Specification of Errors.

Petitioner contends that:

1. The Board acted contrary to law by holding that recognition of the Machinists by Petitioner was unlawful.

2. The Board acted contrary to law by extending the rule in *Midwest Piping Co.*, 63 NLRB 1060 (1945) to the facts of this case.

3. The Board contravened national labor policy by holding that Petitioner recognizes a union at its peril when it has no good faith doubt concerning the union's majority status.

4. The Board's finding that the Machinists did not represent a majority of Petitioner's employees is not supported by substantial evidence in the record considered as a whole.

5. The Board misconstrued the decision of the Supreme Court of the United States in the case of *International Ladies Garment Workers Union, AFL-CIO v. NLRB*, 366 U.S. 731 (1961).

6. The Board improperly ordered Petitioner to reimburse employees for dues paid by employees to the Machinists.

7. The Board improperly overruled the Trial Examiner's interim ruling that circumstances surrounding the signing of unambiguous authorization cards could not be introduced into evidence [IR 44].

Summary of Argument.

Petitioner extended recognition to the Machinists after a cross check of authorization cards was conducted by representatives of a state agency. Petitioner

had no good faith doubt about the majority status of the Machinists at the time of recognition. Under these circumstances the rule in the case of *Snow v. NLRB*, 308 F. 2d 687 (9th Cir. 1962) is applicable. Petitioner was required by law to recognize the Machinists.

The Board justified its holding by finding that in this case Petitioner should have insisted that other unions who had engaged in organizing activities but did not claim majority status be permitted to participate in the cross check.

Such a requirement would require more of an employer than the Board requires or permits under its rules. It is also an unwarranted extension, particularly in this circuit, of the rule in *Midwest Piping, supra.*

The Board ruling which places an employer in jeopardy (acting at his peril) when he follows established rules violates the national labor policy (which encourages collective bargaining), concepts of fair play and the due process clause of the fifth amendment to the Constitution of the United States.

The rule in the *Snow* case provides an objective standard for ascertaining majority status and the Board is precluded from finding otherwise when the conditions in the case are satisfied. Furthermore, uncommunicated revocation of authorization, authority or subjective reservations not made public cannot vary the unambiguous statement on a signed authorization card. Board determination of majority status based on considerations of uncommunicated revocation or reservation is improper.

Dues reimbursement by an employer who neither got the money nor acted improperly is not proper.

ARGUMENT.

I.

Recognition of the Machinists Union Is Required by Law and the Holding of the Board to the Contrary Is Erroneous.

The rule in this circuit is that upon demand an employer *must* recognize a union if the employer entertains no good faith doubt concerning the union's majority status. This rule was established by the court in the case of *Snow v. NLRB,* 308 F. 2d 687 (9th Cir. 1962) at pages 691, 692, 693 and 694. The rule is unequivocal and may not be avoided by a subsequent showing that at the time of recognition grounds existed which would have created a doubt had they been known. *Id.* at page 694.

In the instant case majority status was established by an impartial third party, the State Labor Department [IR 88], through a check of unambiguous authorization cards [INT 1]. The Board affirmed the Trial Examiner's holding that there "was an absence of bad faith on the part of Respondent" in recognizing the Machinists [IR 50].

The *Snow* case is dispositive of the case here. Here all elements of the *Snow* case are present: (1) majority established by unambiguous authorization cards; (2) verified by an impartial third party; and (3) a good faith employer who did not and had no reason to doubt the union's majority status. The rule in the *Snow* case requires recognition. The *Snow* case has been reaffirmed in *Retail Clerks Union, Local 1179 v. NLRB,* 376 F. 2d 186 (9th Cir. 1967); See also *NLRB v. Kellogg's, Inc.,* 347 F. 2d 219 (9th Cir.

1965); *Dixon Ford Shoe Co.*, 150 NLRB 861 (1965); *Levi Strauss & Co.*, 172 NLRB No. 57 (1968); and *McEwen Manufacturing Company and Washington Industries, Inc.*, 172 NLRB No. 99 (1968).

II.

The Company Was Precluded by Law From Insisting on Delaying Recognition Because Other Unions Had Shown an Intention to Organize: Midwest Piping Is Not Applicable.

The principal holding of the Board in the decision appealed here was that a "question concerning representation" existed at the time petitioner recognized the union and that this "question of representation" was not resolved because the recognition by petitioner was not "attended by appropriate safeguards" [IR 88]. The lack of safeguards cited by the Board in support of its decision arose because other unions who were then "engaged in organizing" were not afforded an opportunity to participate in the investigation of the "question concerning representation." [IR 88]. This holding of the Board is tantamount to a holding that the *Midwest Piping* doctrine is applicable. The *Midwest Piping* doctrine is a rule of the Board first enunciated in the case of *Midwest Piping Co.*, 63 NLRB 1060 (1945). Essentially the rule provides that an employer may not elect between two or more unions who claim majority status and demand recognition.

In this circuit the question as to applicability of the *Midwest Piping* doctrine on the facts presented here is controlled by the case of *Retail Clerks Union, Local 770 v. NLRB*, 370 F. 2d 205 (9th Cir. 1966). In the *Retail Clerks* case the court held that recognition by an

employer of a second union which demonstrated its majority status by a card check at a time when a different union showed an interest and had in fact obtained authorization cards was not an unfair labor practice and that the *Midwest Piping* doctrine was not applicable under such circumstances.

The *Midwest Piping* doctrine is applicable only to situations where more than one union claims majority status and demands recognition. The decision here on appeal was not based on a finding that any union other than the recognized union had claimed majority status or demanded recognition [IR 88-89, 48-49]. The Board found specifically to the contrary [IR 48-49]. The uncontradicted evidence in the record is that no union other than the Machinists made a demand for recognition and that the last time that any union other than the recognized union had communicated with the employer was some three months before the date of recognition when an Aluminum Worker representative expressed an intent to organize petitioner's employees [IIR 20]. The Steelworkers and Bellingham Metal Trades Council organizing activities were minimal [GC 9, INT 3A, 4, 13, 15, 17, 26, 30 and 37]. None of the activity other than that of the Machinists constituted a demand for recognition. The fact that no demand for recognition was made by other unions is of itself an indication of lack of real interest. Unions may demand recognition when they do not have majority status, but rarely, if ever, have majority status without making a demand.

Petitioner notified the officials of the State of Washington at the time of the card check that the other unions had been attempting to organize Appellant's em-

ployees [IIR 1097-1098]. Had petitioner with no doubt concerning majority status insisted upon a delay of the proceedings so that the other unions could have participated in the card check petitioner would have violated this court's rule enunciated in the case of *Retail Clerk's Union, Local 1179 v. NLRB,* 376 F. 2d 186 (9th Cir. 1967). In the *Retail Clerk's* case the employer had no doubt as to the union's majority status at the time of the card check but delayed recognition in order to consult with his attorney. The card check took place on September 25 and on October 1 after talking to his attorney and after discovering that two of the card signers no longer desired to have the union represent them, the employer refused to recognize the union. This court held that the delay was a refusal to bargain on the basis of the court's decision in the *Snow* case. The *Retail Clerks* case is directly applicable here.

The alleged requirement of the Board on which it based its decision here to the effect that the employer should have taken affirmative action to see that the other unions participated in the card check is completely without foundation in Board precedent and violates the Board's established rules concerning resolution of a "question concerning representation". The only requirement of the Board with respect to other unions is a requirement on the Board's representation petition form (Form NLRB-502) [GC 8] requiring in paragraph 12 a designation of other unions interested.

On the other hand, the employer in a representation proceeding is precluded from participating in any way (either by review or otherwise) in the Board's determination of the extent to which any union is allowed to participate. Whether or not a union may in-

tervene or participate in representation proceedings is based upon what the Board calls a "showing of interest". The Board rules are specific. The National Labor Relations Board Field Manual at Section 11020 provides as follows:

> "11020 *In general:* The requirement as to adequacy of interest on the part of labor organizations *initiating or seeking participation* in an R case helps to avoid unnecessary expenditure of time and funds where there is no reasonable assurance that a genuine representation question exists, and prevents persons with little or no stake in a bargaining unit from abusing the Agency's machinery and interfering with the normal administration of the Act.
>
> "*The determination of the extent of interest is a purely administrative matter, wholly within the discretion of the Board. While any information offered by any party bearing on the validity of the evidence offered in support of an asserted interest should be received, weighed, and, if appropriate, acted upon, there is no right in any such party to litigate the subject, either directly or collaterally.* (See 11028.4.)" (Emphasis supplied).

This rule of the Board incorporated in its field manual is reflected in the case of *U.S. Chaircraft, Inc.*, 132 NLRB 922 (1961) wherein the Board stated that it "is for the Regional Director or the Board and *not the parties* to determine whether a claim has sufficient authority or validity to require that notice of the proceeding be given to the claimant and an opportunity be given to be placed on the ballot in any consent election which may be held". (Emphasis supplied). To the same effect

is the decision in *O. D. Jennings & Company,* 68 NLRB 516 (1946).

The facts here show that the appellant satisfied all of the Board requirements had the "question concerning representation" been resolved by the Board. The employer notified the impartial third party which conducted the check that other unions had been organizing. This is the only Board requirement, and indeed, as the Board Field Manual and the cases show is as far as the employer is *permitted* to participate under Board rules. The Board cannot require higher standards of a state agency than it requires under its own rules.

The last published annual report of the National Labor Relations Board (31st Annual Report of the National Labor Relations Board for the Fiscal Year Ending June 30, 1966) contains the following statement at page 46:

> "The Act requires that an employer bargain with the representative designated by a majority of his employees in a unit appropriate for collective bargaining. But it does not require that the representative be designated by any particular procedure as long as the representative is clearly the choice of a majority of the employees. As one method for employees to select a majority representative, the Act authorizes the Board to conduct representation elections."

A similar statement has been included in the Board's Annual Report for years. See in this connection the Thirtieth Annual Report at page 45, the Twenty-Ninth

Annual Report at page 43, Twenty-Eighth Annual Report at page 46, Twenty-Seventh Annual Report at page 43 and the Twenty-Sixth Annual Report at page 32.

Checks of authorization cards by state agencies have repeatedly been held to be a valid method of ascertaining majority status. In *Western Meat Packers, Inc.,* 148 NLRB 444, 57 LRRM 1028 (1964) the Board affirmed the following findings of the Trial Examiner appearing at pp. 449-450:

> "It is well established that a Board election is not the sole means by which a union may validly secure recognition as bargaining representative. See United Mine Workers of America v. Arkansas Oak Flooring Co., 351 U.S. 62.
>
> * * * *
>
> ". . . The Board has also recognized as fact State election results and precluded itself from holding second elections."

Contrary to the claimed basis, here, the Board regularly recognizes state proceedings providing fewer safeguards than do Board procedures. As an example of this are the cases of *West Indian Co., Ltd.,* 129 NLRB 1203, 47 LRRM 1146, 1147 (1961) and *Screen Paint Corp.,* 151 NLRB 1266, 1270, 58 LRRM 1641 (1965).

The phrase "question concerning representation" used by the Board is a phrase frequently incorporated in Board decisions. It is incapable of precise definition. If the Board finds that a "question concerning

representation" exists, it must proceed to an election, because the Board has only one method of resolving issues involving representation desires of employees and that method is an election. The effect of the use of the phrase "question concerning representation" is that if the Board determines that an election should be directed it finds a "question concerning representation." If it does not desire that an election be conducted, it finds the lack of existence of a "question concerning representation". The phrase becomes a characterization of appropriate procedure.

If Board procedure is meaningful, the existence or nonexistence of a "question concerning representation" must be determined by objective standards. This is precisely what this court held in the *Snow* case. The thrust of the holding in the *Snow* case is that an employer faced with an objective showing of majority status must recognize the union even though facts exist which would indicate the lack of the existence of majority status. The employer who is unaware of such facts cannot rely on them. The employer cannot delay nor can he engage in lengthy investigation to ascertain hidden facts. He is bound by an objective standard. The objective standard was satisfied here. The employer ought not be held to answer by way of unfair labor practice charges.

III.

Under the Circumstances Here The Board Ruling That the Employer Recognize a Union at Its Peril Is Contrary to Law, Violates Fundamental Concepts of Fair Play and the United States Constitution and Is Not Consistent With the National Labor Policy.

Authority for determining the appropriate bargaining representative is vested in the Board by virtue of Section 9 of the Act. Elaborate machinery is provided therein for determining union majority status. It may be presumed that Congress in enacting the various provisions of Section 9 of the Act desired that "questions concerning representation" be determined by an orderly, definitive and certain process. The National labor policy based on such a process could not be considered to require an employer to act at his peril in recognizing a union. As noted earlier herein, the Board has time and again reiterated the statement that majority status may be determined in a number of ways. Among the ways recognized by the Board is a determination by a check of authorization cards under the auspices of state labor relations agencies. Where as here the employer is required to recognize a union, a rule that the recognition is performed under pain of being thereafter found guilty of an unfair labor practice charge violates the national labor policy and is clearly erroneous.

The Board's rule concerning recognition after a showing of valid authorization cards commands recog-

nition. On the other hand, the ruling in this case, that such a recognition subjects the employer to unfair labor practice charges is completely inconsistent.

Due process is a function of fundamental fairness. Inconsistent legal commands such as that presented here is a denial of the rule of fundamental fairness as outlined in *International Shoe Co. v. Washington,* 326 U.S. 310, 320 (1945) and is a violation of the fifth amendment to the Constitution. It is comparable to the situation presented in *Western Union Telegraph Co. v. Penn,* 368 U.S. 71 (1961) where the Supreme Court struck down the Pennsylvania court ruling placing a stockholder in a potential double liability situation.

IV.

The Board Findings That the Machinists Were Not the Majority Representative of Petitioners Employees Is Not Supported by Substantial Evidence in the Record Considered as a Whole and Is Contrary to Fact and the Board Rules and Is Clearly Erroneous as a Matter of Law.

Out of a total of 122 employees the union presented 81 validly executed authorization cards [IR 47]. The authorization cards were painfully unambiguous [INT 1]. Apparently the cards had been prepared specifically to avoid any possible ambiguity and contained across the top in bold letters "Yes, I want the IAM". Unambiguous authorization cards must be accepted at their face value by employers. To quote the Board ". . . a long line of judicial authority holding that in the absence of clear proof of fraud or coercion, full effect must be given a clear authorization card regardless of the subjective state of mind of the signer." This statement of the Board appears in the recent case of *Levi*

Strauss & Co., 172 NLRB No. 57 (1968). In support of this statement the Board cited the following cases:

NLRB v. Fosdol, 367 F. 2d 784, 786-787 (7th Cir. 1966);

NLRB v. Gorbea, Perez & Morrell, 300 F. 2d 886-887 (1st Cir. 1962);

Joy Silk Mills v. NLRB, 185 F. 2d 732 (D.C. Cir. 1950).

In the *Levi Strauss* case the Board set out its policy with respect to unambiguous authorization cards.

> "The central inquiry in determining the effect to be given authorization cards is whether the employees by their act of signing clearly manifested an intent to designate the union as their bargaining agent. The starting point, in assessing that intent, is the wording of the card. Where a card on its face clearly declares a purpose to designate the union, the card itself effectively advises the employee of that purpose, and particularly so where, as here, the form of the card is such as to leave no room for possible ambiguity. An employee who signs such a card may perhaps not understand all the legal ramifications that may follow his signing, but if he can read he is at least aware that by his act of signing he is effectuating the authorization the card declares. To assume that the employee does not intend at least that much would be to downgrade his intelligence or charge him with irresponsibility. We are unwilling to do either. Without ascribing to such cards and their signing all the solemnity and binding effect associated with deeds, or wills, or contracts, or bills and notes, there is, we believe, in the case of clearly

> expressed authorization cards, as in the case of other signed instruments, no valid basis in reason or law for denying face value to the signed cards, absent affirmative proof that the signing was a product of misrepresentation or coercion.
>
> * * * * *
>
> "Thus the fact that employees are told in the course of solicitation that an election is contemplated, or that a purpose of the card is to make an election possible, provides in our view *insufficient* basis in itself for vitiating unambiguously worded authorization cards on the theory of misrepresentation. A different situation is presented, of course, where union organizers solicit cards on the explicit or indirectly expressed representation that they will use such cards *only* for an election and subsequently seek to use them for a different purpose; i.e., to establish the Union's majority independently."

See also the companion case of *McEwen Manufacturing Company and Washington Industries, Inc.,* 172 NLRB No. 99 (1968).

No attempt was made by the Trial Examiner to resolve any questions concerning the validity of the unambiguous authorization cards presented here. The Trial Examiner and the Board found it unnecessary to determine the validity of the cards on the basis of an allegedly unresolved "question concerning representation" which is demonstratively improper as set out earlier herein.

Competent evidence in line with the *Levi Strauss* case was presented to the Board to demonstrate that the signers of the cards understood the card and what it

meant [IIR 233, 235, 284, 361, 400, 501-502, 536, 572, 580, 667, 716, 790, 864, 914, 972, 989-990, 1071]. Effective argument and proof was also given the Board to the effect that the understanding of all of the employees was consistent with the nature of the cards as demonstrated by the statements contained on the cards.

The Board holdings in the *Levi Strauss* case and the *McEwen Manufacturing Company* case to the effect that the subjective intent of employees signing cards is not a proper area of inquiry was flagrantly violated in the instant case. During the process of the proceedings petitioner and Intervenor objected to the introduction of evidence which would go to the subjective intent of the signer [IIR 53 *et seq.*]. The objection of petitioner was on the basis of the rule enunciated by this court in the *Snow* case to the effect that the subjective intent (being unknown to the employer) is not a proper area of inquiry under the ruling in that case and thus not a proper basis for gauging the activities or the actions of the employer. The Trial Examiner who by coincidence was the same Trial Examiner who first heard the *Snow* case sustained the objections of the employer and Intervenor and precluded evidence of subjective intent. This ruling of the Trial Examiner was overruled by the Board [IR 44] and further proceedings were held during which such evidence was admitted.

The Board ruling in this area had an impact on the Trial Examiner and obviously influenced his subsequent decision. The Board ruling was clearly erroneous.

Where, as here, the authorization cards are clear and unambiguous on their face they must be accepted at their face value if any effect is to be given to this Court's rules.

Likewise, the ruling of the Board that certain of the cards presented during the card check were cancelled by the signing by the same employees of cards containing a revocation of prior cards is no basis for disputing the effect of the card check. The record is void of any evidence showing that the signing of subsequent cards was at any time communicated to the employer. As repeatedly pointed out herein the existence of a disability, if disability there be, unknown to the employer at the time of the check of cards does not relieve the employer from recognizing the union.

The majority status of any union is a fluctuating status. The election results for a group of employees would in all probability be different if another election were held immediately after the tally of ballots on the first election. The results one week would be different than the results the following week. The desires of employees for union representation fluctuate from time to time and from day to day. National labor policy decrees that some permanence be given to the appropriate selection of bargaining representatives. In the case of a Board election the Board has adopted a rule that such permanence must last for at least one year from the date of certification. Undoubtedly during the course of the year the employees' desires fluctuate. The one year rule and other pronouncements of the Board are but another way of saying that once the sentiments of employees have been established by objective standards that result will not be disturbed by

after thoughts. This is the thrust of the decision of this court in the *Snow* case.

The theory and reasoning behind such a rule was demonstrated years ago in the case of *National Labor Relations Board v. Century Oxford Corp.,* 140 F. 2d 541, 542 (2d Cir. 1944). There the Board conducted an election and certified the results in favor of the union. Thereafter, the employees circulated a petition which indicated that the employees no longer desired the union as their bargaining representative. The court in commenting upon and sustaining the Board in its finding that the union continued to be the bargaining representative had the following to say concerning the fugitive nature of majority status and of the need for some degree of permanence in the designation of bargaining representative:

> "The purpose of the act is to insure collective representation for employees, and to that end § 9 gives power to the Board to supervise elections and certify the winners as the authorized representatives. Inherent in any successful administration of such a system is some measure of permanence in the results; freedom to choose a representative does not imply freedom to turn him out of office with the next breath. As in the case of choosing a political representative, the justification for the franchise is some degree of sobriety and responsibility in its exercise. Unless the Board has power to hold the employees to their choice for a season, it must keep ordering new elections at the whim of any volatile caprice; for an election, conducted under proper safeguards, provides the most reliable means of ascertaining the deliberate will of the employees. How long

Reliance on the *Garment Workers* case presumes recognition of a minority union. The minority status of the Machinists never was established. To assume minority status either is improper or begs the question. As pointed out earlier herein the minority or majority status of a union must be established by objective standards. The accepted standards were followed by the employer here and no better authority for that proposition exists than the *Garment Workers* case cited by the Board. The *Garment Workers* case stands only for the proposition that an employer acts at his peril if he elects to follow an unapproved method of ascertaining majority status. The Supreme Court in that case clearly indicated that the procedure followed here was a satisfactory method of determining majority status. The Supreme Court specifically held in that case at pages 739-740 as follows:

> "If an employer takes reasonable steps to verify union claims, themselves advanced only after careful estimate—precisely what Bernhard-Altmann and petitioner failed to do here—he can readily ascertain their validity and obviate a Board election. We fail to see any onerous burden involved in requiring responsible negotiators to be careful, by cross-checking, for example, well-analyzed employer records with union listings or authorization cards."

Thus, the *Garment Workers* case specifically holds that a check of authorization cards is a valid objective determination of majority status with the result that once this has been done there can be no claim that a minority union was recognized.

The *Garment Workers* case is clear authority in support of the exact opposite from that for which the Board cites it.

VI.

The Dues Reimbursement Remedy Is Improper.

In the *Garment Workers* case, *supra,* the Supreme Court did not order dues reimbursement. Instead it had the following to say concerning the remedy at page 740:

> "If he is found to have erred in withholding recognition, he is subject only to a remedial order requiring him to comform his conduct to the norms set out in the Act, as was the case here. No further penalty results. We believe the Board's remedial order is the proper one in such cases."

In *Hughes & Hatcher, Inc. v. NLRB,* 57 L.C. ¶12,614 (6th Cir. 1968) at page 21, 357 the dues reimbursement remedy was raised, as here, and disposed of as follows:

> "One other matter remains, and that is the Board's order requiring H & H to make restitution to its employees of the initiation fees and dues paid by its employees under the checkoff provisions of the bargaining agreement, and the proviso in the order which attempted to preserve the rights of employees against the employer under the illegal agreements.
>
> "Retail Clerks asserts in its brief that these moneys are held in escrow by H & H to await the decision of this court. Amalgamated states in its brief that the moneys were paid to it. The record does not disclose the facts.
>
> "If H & H is holding the moneys in escrow to await the decision of this court, there will be no problem, as it can make distribution in accordance with the Board's order. If H & H has paid the moneys to Amalgamated, then the Board's order should be directed against that union and not against

> H & H, which acted merely as a conduit for the funds, and there is no reason why it should be penalized. Amalgamated violated the Act just as well as H & H, and if it received the money it should refund the same."

The dues reimbursement remedy should be similarly treated here. Moreover, by all rules of the Court the employer here was precluded from legally ascertaining any disability in the authorization cards. Any disability, if disabilities there were, was employee generated and Machinists perpetuated. They should handle the dues problem *inter sese*. To hold the employer is improper.

Conclusion.

Under the rules in the Ninth Circuit, on the basis of the facts presented here the employer was required to recognize the Machinists. The Board may not overrule the Court's decision in the *Snow* case by characterization and find mysteriously a lack of resolution of a "question concerning representation" on the pretext of improper employer action where Board rules preclude such employer action. There is no recognition at the "peril" of the employer when he follows established rules. The employer here followed the rules of the Ninth Circuit and the Supreme Court of the United States when it extended recognition to the Machinists.

In any event, the dues reimbursement remedy was improper.

It is respectfully submitted that the order of the Board should be set aside.

KINDEL & ANDERSON,
ROY E. POTTS,
By ROY E. POTTS,
Attorneys for Petitioner.

APPENDIX.

Exhibits Introduced at Hearing	Description	Page in record* Where Exhibit Was Identified	Offered	Received
General Counsel (GC) Exhibit 1a-1v	Board formal documents	6	6	6
GC 2	Letter demand for recognition	37	39	40
GC 3	Letter reply of Company to demand	38	39	40
GC 4	Consent to cross check	38	39	40
GC 5	List of employees	38	39	40
GC 6	State certification	39	39	40
GC 7	Letter State of Washington re cross check	40	40	40
GC 8	Representation petition in Case No. 19-RC-3896	49	50	51
GC 9	Aluminum Workers Authorization Cards	89	89	95
GC 10	Company payroll records	118	177	177
GC 11	Collective bargaining agreement	177	177	177
GC 12	List of classifications	181	182	188
GC 13	Boardwise on special motion	200	201	201
GC 14	Supplemental to GC 10	826	826	826
GC 15	Motion of General Counsel	855	854	855
GC 16	Ballard affidavit	1164	1165	1165
GC 17	Employee classifications	1208	post	post

*All page references are to Volume II of record.

Exhibits Introduced at Hearing	Description	Page in record Where Exhibit Was Identified	Offered	Received
Intervernors Exhibit 1 (Int.)	IAM authorization Cards	46	46	46
Int. 2	Nims affidavit	275	275	275
Int. 3A	Metal Trades Council Authorization Cards	301	311	311
Int. 3B	Certificate of Horgen	301	311	311
Int. 4	Quillen Metal Trades Council Authorization Card	347	347	347
Int. 5	Hawn authorization card	368	378	379
Int. 6	Hawn authorization card-Metal Trades Council	368	378	379
Int. 7	Hawn affidavit	368	378	379
Int. 8	Bayer affidavit	424	425	426
Int. 9	Bayer affidavit of July 27, 1966	426	427	440
Int. 10	Bailey authorization card-Steelworkers	456	474	474
Int. 11	Bailey affidavit	456	474	474
Int. 12	Feldman statement	479	481	481-2
Int. 13	Morris authorization card-Metal Trades Council	507	526	526
Int. 14	IAM statement	529	529	530
Int. 15	Oppenwall authorization card, Metal Trades Council	546	553	553
Int. 16	Oppenwall statement	546	553	553

Exhibits Introduced at Hearing	Description	Page in record Where Exhibit Was Identified	Offered	Received
Int. 17	Ackerman authorization card, Metal Trades Council	567	570	570
Int. 18	Ackerman statement	567	570	570
Int. 19	Blank Steelworkers affidavit (sample)	613	626	626
Int. 20	Steelworkers letter to Company	613	626	626
Int. 21	Envelope	613	626	626
Int. 22	Anderson affidavit	620	622	650
Int. 23	Irwin affidavit	668	683	692
Int. 24	Irwin and Hindman affidavit	679	683	692
Int. 25	McClusky authorization card Steelworkers	753	755	755
Int. 26	McClusky authorization card Metal Trades	753	755	755
Int. 27	McClusky affidavit	775	775	779
Int. 28	Back of cards	818	819	819
Int. 29	Lamm affidavit	871	872	877
Int. 30	Lamm authorization card Metal Trades Council	878	882	883
Int. 31	Lamm statement	878	882	883
Int. 32	Lamm statement	878	882	883
Int. 33	Bellinger authorization card Aluminum Workers	921	921	922
Int. 34	Bellinger statement	925	925	930
Int. 35	O'Brine statement	957	960	960
Int. 36	Keith statement	980	986	987

Exhibits Introduced at Hearing	Description	Page in record Where Exhibit Was Identified	Offered	Received
Int. 37	Anderson authorization card Metal Trades Council	1024	1024	1025
Int. 38	Hindman authorization card Steelworkers	1076	1076	1077
Int. 39	Hindman authorization card-Metal Trades Council	1077	1078	1078
Int. 40	Hindman affidavit	1078	1082	1082
Int. 41	Boeing contract	1092	1092	1092
Int. 42	Aero Mechanics Newspaper	1092	1092	1092
Int. 43	Aero Mechanics Newspaper	1092	1092	1092
Int. 44	Machinists form letter	1121	1122	1123

No. 22,633

IN THE

United States Court of Appeals

FOR THE NINTH CIRCUIT

INTALCO ALUMINUM CORPORATION, *Petitioner,*

v.

NATIONAL LABOR RELATIONS BOARD, *Respondent.*

On Petition To Review an Order of the National Labor Relations Board and Cross Petition for Enforcement

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INTERVENOR'S BRIEF

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TABLE OF CONTENTS

AUTHORITIES CITED

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INTALCO ALUMINUM CORPORATION, *Petitioner,*

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INTERVENOR'S BRIEF

ISSUES PRESENTED FOR REVIEW

(1) Where, in a new and unorganized plant, a Company is separately advised at separate times by three unions of their intention to organize the employees, does an Employer violate Section 8(a)(2) and (1) of the Act when one of the three unions makes a claim of a majority status, and demands recognition, which claim is resolved and certified by means of a signature check of authorization cards submitted by the union to a Washington State Labor Mediator,

who—at the time of the execution of a "consent cross-check agreement"—was advised by the Company that other named unions had announced an interest in organizing its employees but had made no claim or demand for recognition upon the Company and thus were not "invited" by the Mediator to participate in the card check, the result being that the Company entered into a recognition agreement with the "certified" union?

(2) In the circumstances stated above, may a union rely upon clear and unequivocal authorization cards duly executed by an employee as proof of such majority status when the same employee has executed a duplicate card for another union but has never conveyed to the "claiming" union that it has revoked the use of such card in dealing with the employer in the employee's behalf?

STATEMENT OF THE CASE

No. 22,633 is before the Court on the petition of Intalco Aluminum Corporation to review an order of the National Labor Relations Board (hereafter called "the Board") issued pursuant to Section 10(c) of the National Labor Relations Act, as amended (61 Stat. 136, 73 Stat. 519, 29 U.S.C. Sec. 151, *et seq.*), on February 21, 1968, against Intalco Aluminum Corporation (hereafter called "the Company").

On April 23, 1968, the Board filed its Answer and Cross-Petition for enforcement of that Order. The Board's Decision and Order as well as the Trial Examiner's Decision are reported at 169 NLRB No. 136 (R. 44-56; 87-89).[1]

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[1] References to the pleadings, decision and order of the Board and other papers reproduced as "Volume 1, Pleadings", are designated as "R."

References designated "D. & O." and "TXD" are to the Board's Decision and the Trial Examiner's Decision, respectively; "G.C. Ex.", "TX Ex.", "R. Ex.", and "Int. Ex.", are to General Counsel's, Trial Examiner's, Respondent's Exhibits, and Intervenor's Exhibits, respectively; "Tr." are to the transcript of proceedings before the Board.

On May 6, 1968, International Association of Machinists (hereafter called "the IAM") filed with the Court, its Motion for Leave to Intervene, which Motion was granted on June 4, 1968.

Three unions who were the charging parties in Board Case Nos. 19-CA-3346, 3347, and 3348, United Steelworkers of America, AFL-CIO; (hereafter called "the Steelworkers"); Aluminum Workers International Union, AFL-CIO; (hereafter called "Aluminum Workers"); and, Bellingham Metal Trades Council, Allied Industries Division (hereafter called "the Metal Trades"), respectively, did not intervene in this proceeding.

This Court has jurisdiction of the proceedings under Section 10(f) of the Act.

I. STATEMENT OF THE FACTS

The Board found that the Company violated Section 8(a)(2) and (1) of the Act, by granting recognition to the IAM, at a time when it was not the duly designated representative of the Company's employees within the meaning of Section 9(a) of the Act; and, that the IAM was a minority union. The essential facts upon which this finding rests, largely undisputed, are summarized below.

A. The Background Concerning Recognition

In early 1965 the Company, a Delaware corporation, with its principal offices located at Ferndale, Washington, commenced construction of its plant at that location. It is engaged in the production of aluminum (R. 46). The first hourly employee was hired in June 1965 (*ibid.*).

In the summer or fall of 1965, the representatives of the Aluminum Workers, the Steelworkers, and the IAM called upon the Company at its offices and announced "that they were going to try to organize the employees" (R. 46; Tr. 23, 25, 29). The Aluminum Workers did not commence organizing activity until November of 1965 (Tr. 88). The

Steelworkers commenced their activity sometime in the summer of 1965 (*ibid.*). The Metal Trades commenced an organizing campaign in March of 1966 (R. 46). No other contact with the Company was made by these representatives after 1965. There is nothing in the record that reflects that the Metal Trades representatives contacted the Company.

On March 10, 1966, the IAM by formal letter demanded recognition on the basis that it represented a majority of the employees and offered to prove its majority status by submitting its authorization cards to a third party for a card check (R. 47; Tr. 38; G.C. Ex. 2). On March 14, 1966, the Company answered the IAM's demand and agreed to meet the Union at the offices of Washington State Department of Labor and Industries on March 16, 1966 at 11 A.M. for the purpose of determining the validity of the claim (R. 46-47; Tr. 38; G.C. Ex. 3). At that meeting the IAM and the Company executed a "Stipulation of Agreement—Consent Cross-Check" (R. 47; Tr. 38; G.C. Ex. 4). The Company produced a list of 122 employees which was given to the State of Washington Mediator, Willard A. Olson (Tr. 38; G.C. Ex. 5). At the meeting the Company advised the Mediator that the Aluminum Workers and the Steelworkers were also interested in organizing its employees but had received no demand for recognition nor any claim from either of them (Tr. 61-62; 1093-1099). After the card and signature check Mr. Olson issued his "Certification on Conduct of Consent Cross-Check", dated March 16, 1966 (R. 48; Tr. 39; G.C. Ex. 6). As a consequence, the Company on that date entered into a "recognition agreement" with the IAM in which it agreed to recognize the IAM as the exclusive representative of its hourly production and maintenance employees (R. 88, at note 1; 48). On March 17, 1966 Mr. Olson issued a report to the parties finding, *inter alia,* that of the 122 employees' names submitted by the Company, the IAM presented 85 signed authorization cards, of which 81 authorization cards bore

genuine signatures checked against signatures of these employees in Company files (R. 48-49; Tr. 39-40; G.C. Ex. 7; Int. Ex. 1; Tr. 46).

B. The Subsequent Events

On March 18, 1966 in Case No. 19-RC-3896, the Aluminum Workers filed with the Board its petition for representation together with 44 authorization cards as provided in Section 9(a) of the Act (Tr. 48-51; 89; 95; G.C. Exs. 8; 9).[2] It was stipulated that copies of the petition were mailed by the Board on Friday, March 18, 1966 to the Company and to the IAM, and received by them on March 21, 1966 (Tr. 50-51). At the same time the Steelworkers in Case No. 19-CA-3346, the Aluminum Workers in Case No. 19-CA-3347, and the Metal Trades in Case No. 19-CA-3348, filed "blocking" charges alleging violations of 8(a)(2) and (1) of the Act (R. 3, 4, 5).[3] Amended charges were subsequently filed on April 29, 1966 (Aluminum Workers), and May 9, 1966 (Steelworkers and Metal Trades) (R. 6, 7, 8). On May 11, 1966 the Board issued its Complaint, which was amended on August 5, 1966 (R. 9-13; 20). An Answer to the Complaint, and an Amended Answer was filed on June 17, 1966, and August 11, 1966 by the Company (R. 17-19; 21-23).

Between March 16, 1966—the date of the execution of the recognition agreement—and April 14, 1966, the Company negotiated and entered into a formalized collective bargaining agreement with the IAM which had its termination date July 1, 1968 (Tr. 177; G.C. Ex. 11).

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[2] The petition was not withdrawn, and is still pending before the Board.

[3] A "blocking" charge in Labor parlance forecloses an investigation under Section 9(a) of the Act, unless a so-called "*Carlson's Furniture*" waiver is filed by the charging unions (*Carlson's Furniture Industries, Inc., et al.*, 153 NLRB 162).

C. The Complaint and the Issues Upon Which the Case Was Tried

The entire theory under which this case was tried by the General Counsel and the charging parties was (1) that the IAM's majority status was tainted by "reason of fraud in the inducement of employees to execute authorization cards" (R. 27-28); and, (2) that there was not a representative complement of employees in the plant at the time of recognition (R. 11; "Complaint", par. 8(b)).[4]

The latter issue was resolved by both the Trial Examiner and the Board against the General Counsel when they both found that there existed a question of representation at the time of recognition of the IAM by the Employer (R. 52; TDX: Concluding Findings; lines 31-32; R. 88; D. O., p. 2).

As to the former issue, neither the Trial Examiner nor the Board made *any* credibility resolutions with respect to the testimony concerning the thirty-odd witnesses called by the General Counsel (*Ibid.*).

After the matter had been duly litigated by all parties before the Trial Examiner, subsequent exceptions and cross-exceptions were filed and briefed to the Board (R. 56; 59; 66; 78; 79; 81).

D. The Trial Examiner's and the Board's Conclusions

Both the Trial Examiner and the Board concluded and found that because 30 of the authorization cards secured by the IAM were signed by employees who also signed cards for one of the other unions, these 30 cards are insufficient to establish the signers' selection of the IAM as the exclusive bargaining representative, and, accordingly the IAM at the time of recognition was a minority union and not the duly designated representative of the Company's employees within the meaning of Section 9(a) of the Act (R. 88-89).

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[4] This issue, in a normal representation proceeding is known as an "expanding unit" theory (*General Extrusion Co., Inc.*, 121 NLRB 1165).

In reaching this conclusion, the Board reasoned that at the time of recognition of the IAM, other unions, who were then known to the Company and the IAM to be engaged in organizing the employees were not afforded an opportunity to participate in the State-conducted card check; that the "consent agreement" was in effect a recognition by the parties that a "question concerning representation" existed; that the investigation and resolution of that question was not attended by appropriate safeguards—namely, inviting other unions to participate in the card check; and, that the Company thus acted at its peril in relying on the State certification of the IAM as the representative of its employees (*Ibid.*).

On these conclusions the Board adopted as its Order the Order and Recommended Order of the Trial Examiner (R. 89; 55).

ARGUMENT

I.

An employer may recognize a union as the bargaining representative so long as the union represents a majority of the employees and no election is required to establish the union's majority status (*United Mine Workers* v. *Arkansas Oak Flooring Co.*, 351 U.S. 62; 72 at note 8). Indeed, absent a good faith doubt as to the union's majority it is the employer's duty to grant recognition to the requesting union (*Snow* v. *N. L. R. B.*, 308 F. 2d 687; 691 (C. A. 9).

In this case, at the time the employer granted recognition there was an ample showing of the union's majority status. The Board would detract from the employer's reliance upon this ample majority showing on the ground that when recognition was granted it knew that other unions were engaged in organizing the employees. But this circumstance alone cannot bar recognition of a union which has attained majority status. Recognition is not to be delayed, and collective bargaining deferred, because other

unions have an interest in organization. The interest of competing unions must reach a level of organizing intensity so that the employer may fairly be said to have *known* the rival unions have gained a substantial hold (*N. L. R. B.* v. *Wheland Company,* 271 F. 2d 122; 124 (C. A. 6). And mere "interest" is not the equivalent to a claim by an organization that it represents a majority of the employees and requests bargaining rights. Nor can mere "interest" of a rival labor organization or "campaigning" be equated with or given the stature of a majority claim or even a "bare" claim of representation (*The Baldwin Company,* 81 N.L.R.B. 927-929).

In the case before this Court the facts have been adequately explicated but this summary in the context here may illuminate the problem. Here, three union representatives call upon an employer to advise him that they desire to organize his employees. Each of them called upon him at separate times. At all times he remained neutral. There was no patent organizing activity and no contact with the employer by any of the union representatives between December 1965 and March 1966. In March 1966 he received the majority claim and an offer to prove the claim through a neutral party from the IAM. At which point a card check was made by the neutral party—a State mediator. The employer advised the Mediator at that time, that he had been approached by the Aluminum Workers and the Steelworkers of their desire to organize the employees but he had received no demand for recognition from either union. And it was not until two days *after* the recognition agreement was executed that the pyrotechnics began. Suddenly, a petition was filed together with simultaneous 8(a)(2) charges which, under normal circumstances, would "block" the processing of the petition to an election. The petition was *not* dismissed as untimely because the contract had been signed as was the case in *N.L.R.B.* v. *Airmaster Corporation,* (339 F. 2d 553; 555 (C. A. 3)). Instead we were charged with fraud and misrepresentation in the

method our cards were obtained. But it does not suffice to destroy the ample showing of majority status for the Board to say that 30 employees signed cards for other unions as well as the IAM, in the absence of clear proof of fraud or coercion (see e.g., *N. L. R. B.* v. *Fosdal,* 367 F. 2d 784; 786-787 (C. A. 7); *Joy Silk Mills, Inc.,* 85 N.L.R.B. 1263, *enfd.* 185 F. 2d 732 (C. A. D. C.), *cert. denied* 341 U.S. 914; *Iowa Beef Packers, Inc.* v. *N. L. R. B.,* 331 F. 2d 176 (C. A. 8).

These employees never informed either the Employer or the Intervenor that they had repudiated the IAM's authorization to act as their agent. The Employer and the IAM were therefore entitled to rely on the designation of the IAM, no repudiation having been communicated to them by the employees (*Jas. H. Matthews & Co.* v. *N. L. R. B.,* 354 F. 2d 432, 438 (C. A. 8); *Phil-Modes, Inc.,* 159 N.L.R.B. 944, 950; (*Restatement* (2d) *Agency,* § 119 (c) (1958). Moreover, the lesson of *Keller Plastics Eastern, Inc.,* (157 N.L.R.B., 583) is to the contrary. There, the Board decided at page 586, that in situations involving "a bargaining status established as a result of [the employer's] voluntary recognition of a majority representative, . . . like situations involving certifications, . . . the parties must be afforded a reasonable time to bargain and to execute the contracts resulting from such bargaining." The Board, in that case, accepted the Respondent's assertion that at the time it executed the contract it was unaware of the Union's loss of a majority status, and also the fact that there was nothing in the record to indicate that the Respondent was *aware* of the presence of the Teamsters Union, the charging party in the case (*Id.* p. 587, Note 4) (See also, *Retail Clerks Union, Local 770* v. *N. L. R. B.,* 370 F. 2d 205, (C. A. 9).

In the circumstances of this case, the most that the duplicatory cards would have justified was an election (See, *Rheingold Breweries, Inc.,* 162 N.L.R.B., No. 32; *Sound Contractors Association,* 162 N.L.R.B. No. 45). But the

rival unions did not wish an election because while filing a representation petition under Section 9(a), they also filed an 8(a)(2) charge that "blocked" an election. The 8(a)(2) charge was dismissal as totally devoid of merit that a "real" or "genuine" question concerning representation existed as to these three unions (See, *Diana Shops of Washington State, Inc.,* 170 N.L.R.B. No. 54, released March 28, 1968 at page 4, note 2 where the Board in an 8(a)(5) situation implied that where there is evidence that a "blocking" charge is filed for the purpose of blocking an election the Board will consider this among other circumstances in connection with a *pending petition* or a refusal to bargain (see also, *Carlson's Furniture Industries, Inc., supra*). Thus had the rival unions actually thought that their so-called showing of interest would enable them to win an election, they could and would have proceeded to one. That they did not proceed with the processing of the Petition, convincingly shows that they themselves recognized that the IAM was the majority choice. They simply used the Board's processes to gain time within which they hoped to gain a majority. But the existing IAM majority was ample legal basis for the grant of recognition (*I. L. G. W. U., AFL-CIO (Bernhard-Altmann Texas Corp.)* v. *N. L. R. B.,* 366 U.S. 731; 738; *Retail Clerks Union, Local 770* v. *N. L. R. B.,* 370 F. 2d 205 (C. A. 9); *cf. Midwest Piping,* 63 N.L.R.B. 1060; *N. L. R. B.* v. *Airmaster Corporation,* 339 F. 2d 553 (C. A. 3).

In any event, had the Board concluded in its investigation that a real question of representation existed at the time of recognition and despite the State Board certification it was not preempted from proceeding promptly in resolving the issue (*San Diego Building Trades* v. *Garmon,* 359 U.S. 236; 239; *Rheingold, (supra); Sound Contractors, (supra); Weber* v. *Anheuser Busch,* 348 U.S. 468; 481).

Moreover, duplicate authorization cards signed by the same employee for different unions do not render these cards invalid or void for purposes of a card check where,

as here, the authorization cards were free from ambiguity or misrepresentation. All that was required under the circumstances was the Company's good faith in dealing with the IAM's demand for recognition as this was the only issue before it at that time (*Bernhard-Altmann, (supra); Retail Clerks Union, Local 770, supra; Airmaster Corporation, supra*). In *Local 1325, Retail Clerks International Association, AFL-CIO* v. *N. L. R. B., et al.,* 325 F. 2d 293, (C. A. 1), the Court, in a situation not too dissimilar from the facts in this case, said at pages 294-295:

> '['W]e see no great hardship on [these] particular union[s] in view of [their] complete lack of diligence.* But even if there were hardship, the present rule would suspend a Damoclesian sword over every instance where an employer innocently accepted, legitimate accommodation to an organizational campaign. We do not think this admittedly highly unusual case should be permitted to make bad general law.''
>
> ''* The rival union in this case neither kept an eye on what the successful union was doing openly, nor, after the employer ignored its request did it pursue the matter. There was a considerable interval between the making of the request, the card check and actual recognition of the successful union, and the negotiating of the collective bargaining agreement.''

Assuming, *arguendo,* that the Court sustains the Board's Order enforcing the 8(a)(2) violation, in our view, absent a finding of an independent 8(a)(1) which the Board did *not* find, and under the peculiar circumstances of this case, the remedy of reimbursement of dues and other monies exacted under the contract is more in the nature of a penalty rather than a remedy to be exacted against the Company. To enforce this order under these circumstances is to permit a ''windfall'' to the employees who have benefited by the collective agreement (*Hughes & Hatcher, Inc.,* v. *N. L. R. B.,* 393 F. 2d 557 (1968), (C. A. 6).

CONCLUSION

For the reasons set forth above, we respectfully submit that this Court should issue an order denying enforcement of the Decision and Order of the National Labor Relations Board.

Respectfully submitted,

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APPENDIX

The relevant provisions of the National Labor Relations Act, as amended (61 Stat. 136, 29 U.S.C., Secs. 151 *et seq.*), are as follows:

* * * * *

Sec. 7. Employees shall have the right to self-organization, to form, join, or assist labor organizations, to bargain collectively through representatives of their own choosing, and to engage in other concerted activities for the purpose of collective bargaining or other mutual aid or protection, and shall also have the right to refrain from any or all of such activities except to the extent that such right may be affected by an agreement requiring membership in a labor organization as a condition of employment as authorized in section 8 (a) (3).

* * * * *

Sec. (8) (a) It shall be an unfair labor practice for an employer—

(1) to interfere with, restrain, or coerce employees in the exercise of the rights guaranteed in section 7;

(2) to dominate or interfere with the formation or administration of any labor organization or contribute financial or other support to it * * *.

* * * * *

(5) to refuse to bargain collectively with the representatives of his employees, subject to the provisions of section 9 (a).

* * * * *

REPRESENTATIVES AND ELECTIONS

Sec. 9. (a) Representatives designated or selected for the purposes of collective bargaining by the majority of the employees in a unit appropriate for such purposes, shall be the exclusive representatives of all the employees in such unit for the purposes of collective bargaining in respect to rates

of pay, wages, hours of employment, or other conditions of employment: Provided, That any individual employee or a group of employees shall have the right at any time to present grievances to their employer and to have such grievances adjusted, without the intervention of the bargaining representative, as long as the adjustment is not inconsistent with the terms of a collective-bargaining contract or agreement then in effect: Provided further, That the bargaining representative has been given opportunity to be present at such adjustment.

* * * * *

(c)(1) Wherever a petition shall have been filed, in accordance with such regulations as may be prescribed by the Board—

> (A) by an employee or group of employees or any individual or labor organization acting in their behalf alleging that a substantial number of employees (i) wish to be represented for collective bargaining and that their employer declines to recognize their representative as the representative defined in section 9(a), or (ii) assert that the individual or labor organization, which has been certified or is being currently recognized by their employer as the bargaining representative, is no longer a representative as defined in section 9(a) . . .

* * * * *

PREVENTION OF UNFAIR LABOR PRACTICES

Sec. 10 . . . (f) Any person aggrieved by a final order of the Board granting or denying in whole or in part the relief sought may obtain a review of such order in any circuit court of appeals of the United States in the circuit wherein the unfair labor practice in question was alleged to have been engaged in or wherein such person resides or transacts business, or in the United States Court of Appeals for the District of Columbia, by filing in such court a written petition praying that the order of the Board be modified or

set aside. A copy of such petition shall be forthwith transmitted by the clerk of the court to the Board, and thereupon the aggrieved party shall file in the court the record in the proceeding, certified by the Board, as provided in section 2112 of title 28, United States Code. Upon the filing of such petition, the court shall proceed in the same manner as in the case of an application by the Board under subsection (e) of this section and shall have the same jurisdiction to grant to the Board such temporary relief or restraining order as it deems just and proper and in like manner to make and enter a decree enforcing, modifying, and enforcing as so modified, or setting aside in whole or in part the order of the Board; the findings of the Board with respect to questions of fact if supported by substantial evidence on the record considered as a whole shall in like manner be conclusive.

No. 22633

IN THE

United States Court of Appeals

FOR THE NINTH CIRCUIT

INTALCO ALUMINUM CORPORATION,

Petitioner,

vs.

NATIONAL LABOR RELATIONS BOARD,

Respondent.

REPLY BRIEF OF INTALCO ALUMINUM CORPORATION.

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TOPICAL INDEX

TABLE OF AUTHORITIES CITED

Cases

Statutes

No. 22633

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REPLY BRIEF OF INTALCO ALUMINUM CORPORATION.

Preliminary Statement.

A statement of the case is contained in the opening brief of Intalco Aluminum Corporation, Petitioner herein. Respondent, National Labor Relations Board (hereinafter referred to as the Board) submitted a counter statement of the case in its brief but the Board's counter statement varied only as to form and as not as to substance from that of Intalco.

Intalco files this reply brief because the Board has failed to meet the issues presented in Intalco's opening brief. The reasoning of the Board in its brief is bottomed on the premise that Intalco recognized a minority union at the time it recognized the Machinists. The Board did not answer the issues raised in this ap-

peal as to how it arrived at the conclusion that a minority union was recognized.

Before the Board can argue that Intalco recognized a minority union it must show, one, that at the time of recognition less than a majority of the unit employees had expressed their preference for the union recognized, and two, that the method employed for ascertaining employee preference was improper.

The first issue concerning the status of employee preference at the time of recognition was raised in Intalco's opening brief and was not answered in the Board's brief.

The second issue likewise remains unanswered. Instead the Board avoids these questions by assuming that a minority union was recognized.

When the Board held in the first instance that the "question concerning representation" was not resolved by the card check conducted by representatives of the State of Washington, it placed squarely in issue the question as to whether or not Intalco followed established procedures. That issue is not resolved by assuming that the result was wrong.

ARGUMENT.

I.

The Board Ignores the Fundamental Question in Its Brief.

The Board misconstrues the issues when it states that the rule in *Midwest Piping Co.,* 63 N.L.R.B. 1060 (1945) is immaterial to these proceedings. In the *Midwest Piping* case the Board held that a check of membership cards was not a satisfactory method of ascertaining majority status of a union when the employer was faced with conflicting *demands* from two or more labor organizations who were competing for representation rights. In the instant case the Board has held that a check of authorization cards is not a proper method of ascertaining status between competing unions when all of the unions competing are not permitted to participate in the check of cards. Whether or not the *Midwest Piping* case is cited in the Board's current decision, the effect of the decision here is to extend the doctrine outlined in the *Midwest Piping* case.

The Board's present position that *Midwest Piping* is of no concern here is directly contradictory to its position taken in the *Boy's Market, Inc.,* 156 N.L.R.B. 105 (1965). There the Board found (and the Circuit Court affirmed in *Retail Clerks Union, Local 770 v. NLRB,* 370 F. 2d 205 (9th Cir. 1966)) that the *Midwest Piping* doctrine was significant and relevant but not applicable to the situation where the employer recognized one of two competing unions after a check of cards of only one of the two unions. The *Retail Clerks* case decided by this Circuit stands for the proposition that the *Midwest Piping* doctrine should not be extended to facts presented here. Implicit in that de-

cision is the holding that the Board's decision in the present case is an unwarranted extension of the *Midwest Piping* rule.

Perhaps the Board's inability to see that its decision in this case is an extension of the *Midwest Piping* doctrine stems from a misapprehension of the holding of the Supreme Court in the case of *International Ladies' Garment Workers' Union, AFL-CIO v. U.S.*, 366 U.S. 731 (1961).

In the Garment Workers' case, the Supreme Court upheld a Board decision finding an employer guilty of an 8(a)(2) violation. The employer had extended recognition to the union upon the representation of the union to the employer that a check of authorization cards in the possession of the union with the number of employees on the payroll had indicated that the union was the majority representative. Neither the employer nor the union made any effort at the time of recognition to check the cards in the union's possession against the employer's current payroll list.

In the instant case the Board cites the following portion of the Court's opinion in the *Garment Workers'* case for the proposition that Intalco's good faith in recognizing the Machinists' Union cannot save it from an 8(a)(2) charge because the Company acted at its peril.

> We find nothing in the statutory language prescribing scienter as an element of the unfair labor practices here involved . . . [P]rohibited conduct cannot be excused by a showing of good faith.

This language when considered in the abstract seemingly would support the General Counsel's contention that good faith is not a relevant consideration in an

8(a)(2) proceeding. However, when the quoted language is placed in context and the reasoning of the Supreme Court considered in its entirety a different conclusion is reached. The Supreme Court did not use the terms "good faith" and "scienter" in the same sense as does the General Counsel and the Board.

The General Counsel implies that the Supreme Court meant that an employer violates Section 8(a)(2) by recognizing a union that subsequently turns out not to represent a majority of the employees notwithstanding the reasonableness of the employer's conduct in initially extending recognition and notwithstanding the method employed by the parties to ascertain the majority status. This reasoning, however, fails to recognize that in the *Garment Workers'* case the employer did not make a reasonable effort to determine whether the Union actually represented a majority of the employees. When the Court said that scienter is not a prerequisite to an 8(a)(2) violation and that good faith on the employer's part is irrelevant, it meant that guilty knowledge is not required and that an employer proceeds at his peril if he recognizes a union upon his *subjective* good faith belief that the union represents a majority of his employees. In using the terms "scienter" and "good faith belief" the Court was not referring to an *objective* good faith belief, that is, a belief that results from the employer's compliance with the objective standards laid down by the Board and courts. The following quotation illustrates that the Court was limiting its "proceed at your peril" ruling to employers who acted unreasonably or carelessly:

> The petitioner, while taking no issue with the fact of its majority status on the critical date,

> maintains that both [the employer's] and his own good-faith belief in petitioner's majority status are a complete defense. To countenance such an excuse would place in permissively careless employer and union hands the power to completely frustrate employee realization of the premise of the Act. . . .

366 U.S. at 738-739. Additional support for the proposition that the Court's referral to scienter and good faith was limited to the subjective state of mind of the employer is found in the following quotation:

> Neither employer nor union made any effort at that time to check the cards in the union's possession against the employee roll, or otherwise, to ascertain with any degree of certainty that the union's assertion, later found by the Board to be erroneous, was founded on fact rather than upon good-faith assumption.

366 U.S. at 734. The Court then went on to state that an employer satisfies the mandates of the Act if he verifies the union's claim of majority by conducting a card check with a reliable third party:

> If an employer takes reasonable steps to verify union claims, themselves advanced only after careful estimate—precisely what Bernhard-Altmann and petitioner failed to do here—he can readily ascertain their validity and obviate a Board election. We fail to see any onerous burden involved in requiring responsible negotiators to be careful, by cross-checking, for example, well-analyzed employer records with union listings or authorization cards.

Since in the instant case Intalco did verify the Machinists' claims by means of a card check conducted by

a reliable third party, the *Garment Workers'* case directly supports Intalco's position that the Company did not violate Section 8(a)(2) in extending recognition. The Company properly utilized a reliable objective standard to ascertain the validity of the union's assertion. Under the rule embodied in the *Garment Workers'* case the method employed by Intalco established the Machinists majority status as a *fact* and eliminated assumption as a basis for recognition.

The *Garment Workers'* case stands directly for the proposition that majority status ascertained by a card check conducted by a reliable third party is an objective means of ascertaiing majority status which may be relied upon by an employer and that no "peril" is attached to such recognition. Majority status established by this method is not subject to a hindsight consideration of other elements. The Board's assumption in its brief that Intalco recognized a minority union is erroneous as a matter of law.

This is precisely the effect of the decision of this circuit in *Snow v. NLRB,* 308 F. 2d 687 (9th Cir. 1962). For the Board to say the *Snow* case is inapplicable is to ignore the facts and the law. In view of the Supreme Court's decision in the *Garment Workers'* case and this Court's decision in the *Snow* case the only way in which the Board decision could be permitted to stand would be by a retroactive application of a major policy change. Such policy change would be an extension of the principles announced in the *Midwest Piping* case and a modification of the mandate announced by this Circuit in the *Snow* case.

Intalco conducted itself reasonably, in good faith, and in compliance with the law as it existed at the time

the card check was conducted and the change in policy should not be made applicable to Intalco.

This circuit demonstrated an awareness of the inequities created by retroactive policy making in its opinion in *NLRB v. Guy F. Atkinson Co.,* 195 F. 2d 141, 149 (9th Cir. 1952):

> The inequity of . . . retroactive policy making upon a respondent innocent of any conscious violation of the act, and who was unable to know when it acted, that it was guilty of any conduct of which the Board would take cognizance, is manifest. It is the sort of thing our system of law abhors.

Accord, NLRB v. A.P.W. Prods. Co., 316 F. 2d 899, 904-06 (2d Cir. 1963); *NLRB v. E & B Brewing Co.,* 276 F. 2d 594 (6th Cir. 1960); *Pedersen v. NLRB,* 234 F. 2d 417, 419 (2d Cir. 1956); *NLRB v. International Bhd. of Teamsters,* 225 F. 2d 343, 348 (8th Cir. 1955).

II.

The Board's Remedy of Dues Reimbursement Is Contrary to Established Board Policy.

In support of its remedy of dues reimbursement the Board relies heavily on the case of *Virginia Electric & Power Co. v. NLRB,* 319 U.S. 533 (1943). In the *Virginia* case the Board had ordered the disestablishment of a company dominated union and reimbursement of dues paid to the union. Unlike the present case the employer in the *Virginia* case had intentionally violated the Act. And the Supreme Court apparently felt that by requiring the employer to reimburse the employees for dues paid to the company dominated union the policies of the Act would be effectuated. In the *Garment Workers'* case, however, the

employer had acted in good faith although unreasonably so in recognizing the union. The Board and the Court felt that the policies of the Act would not be effectuated by an order that went beyond requiring the employer "to conform his conduct to the norm set out in the Act. . . ." The employer in the Garment Workers' case behaved carelessly whereas Intalco in the instant case behaved carefully and reasonably. As a result, the facts of the present case provide an even more compelling reason for not assessing a monetary remedy.

Board rules governing monetary awards in analogous situations support the view that employer culpability can legally affect the issue of dues reimbursement liability. For example, when a trial examiner absolves an employer of the charges against him and the Board subsequently finds the employer guilty of those charges a back pay order will not include compensation for the period between the conflicting Trial Examiner's report and the Board decision if there was not "deliberate employer intent to obstruct . . . [his employees'] collective activities." *Ferrell-Hicks Chevrolet, Inc.*, 160 N.L.R.B. 1692, 1696 CCH NLRB Dec. ¶ 20,762, 63 L.R.R.M. 1177 (1966). Similarly, a circuit court has held that a Board order requiring the restitution of a Christmas bonus that was discontinued for economic reasons without consulting the union was inappropriate because the employer lacked an anti-union motivation. *NLRB v. Citizens Hotel Co.*, 326 F. 2d 501, 505-06, 508-09 (5th Cir. 1964).

Since the Board considers employers' state of mind to be relevant to monetary awards in 8(a)(3) and 8(a)(5) proceedings, the Board unjustifiably failed to

afford Intalco the same consideration in fashioning the award in this case. Unlike the *Ferrell-Hicks* case and the *Citizens Hotel* case, Intalco was held to have violated Section 8(a)(2) because it conformed its conduct to a court announced rule of law, namely the *Snow* case. Consequently, the facts of this case supply a compelling reason for considering state of mind in refusing to order a monetary remedy.

The foregoing cases serve to emphasize the basic position of Intalco with respect to the dues reimbursement remedy. Intalco followed the established law in extending recognition to the Machinists. On the facts as they appear in the record the acts which would lead to a minority union finding if such acts are properly cognizable as a matter of law are acts of the union and not of the employer. Intalco was without fault. The union received the benefit of the dues deduction. Intalco served only as a conduit for the dues. To order Intalco to reimburse dues is to have Intalco answer for the fault or miscarriage of another. This obviously is wrong.

Conclusion.

The selection of employee bargaining representative concerns employees, unions and employers alike. Stability of the bargaining relationship is essential to national labor policy. To insure stablility the method of selection should be based on objective standards available and known at the time of selection. To permit an after-the-fact challenge to the following of established procedures in selecting the representative is to invite chaos.

Majority status is established as a matter of law after reasonable rules have been followed. By all es-

tablished standards including those of this Court, the Supreme Court of the United States and the Board's own procedures, Intalco properly recognized the Machinists. Absent a showing that established procedures were not followed, the Board should not be permitted to question the results. This is what the Board did in its brief when it assumed that Intalco recognized a minority union.

It is respectfully submitted that the order of the Board should be set aside.

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No. 22,633

IN THE

United States Court of Appeals

FOR THE NINTH CIRCUIT

INTALCO ALUMINUM CORPORATION,
Petitioner,

v.

NATIONAL LABOR RELATIONS BOARD,
Respondent,

and

INTERNATIONAL ASSOCIATION OF MACHINISTS
AND AEROSPACE WORKERS, AFL-CIO,
Intervenor.

On Petition for Review and Cross-petition
for Enforcement of an Order of
The National Labor Relations Board

BRIEF FOR THE NATIONAL LABOR RELATIONS BOARD

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INDEX

AUTHORITIES CITED

CASES:

Page

Page

STATUTE:

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**On Petition for Review and Cross-petition
for Enforcement of an Order of
The National Labor Relations Board**

COUNTERSTATEMENT OF ISSUES PRESENTED

1. Whether the Board properly concluded that the Company violated Section 8(a)(2) and (1) of the Act by recognizing and executing a contract with the Machinists at a time when the Machinists represented only a minority of unit employees.

2. Whether the Board's reimbursement order is valid and proper.

COUNTERSTATEMENT OF THE CASE

This case is before the Court upon the petition of the Intalco Aluminum Corp. (the Company) to review and set aside an order of the National Labor Relations Board issued against the Company on February 21, 1968, pursuant to Section 10(c) of the National Labor Relations Act, as amended

(61 Stat. 136, 73 Stat. 519, 29 U.S.C., Sec. 151, *et seq.*). In its answer, the Board has requested that its order be enforced in full. The Board's Decision and Order are reported at 169 NLRB No. 136. This Court's jurisdiction is invoked under Section 10(e) of the Act, the events having taken place at the Company's plant in Ferndale, Washington.

I. THE BOARD'S FINDINGS OF FACT

The Board found that the Company violated Section 8(a)(2) and (1) of the Act by recognizing and entering into a contract with the Machinists[1] at a time when it was a minority union. The evidence underlying the Board's findings is detailed below.

The Company is a Delaware corporation which began construction in 1965 of an aluminum manufacturing plant in Ferndale, Washington (R. 46).[2] Starting about a month after the Company hired its first hourly rated employee in June 1965, representatives of various unions announced to management officials that they would attempt to organize the workers at the Ferndale plant (R. 46; Tr. 14, 23). Thus, during the summer of 1965 a representative of the Machinists advised the Company's manager of employment and training of its intentions to become the bargaining agent of the newly hired employees (R. 46; Tr. 29). In July and then again in November 1965, a Steelworkers[3] organizer similarly contacted the

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[1] International Association of Machinists and Aerospace Workers, AFL–CIO.

[2] "R." refers to the formal documents reproduced, pursuant to Court Rule 10, as "Volume I, Pleadings"; "Tr." refers to portions of the stenographic record, also reproduced pursuant to Rule 10. References designated "G.C. Exh."; or "Inter. Exh." are to the exhibits of the General Counsel and the Machinists respectively.

[3] United Steelworkers of America, AFL–CIO.

Company, as did a representative of the Aluminum Workers[4] in December of that year (R. 46; Tr. 19-20, 23, 25, 92-93). These unions, and a fourth labor organization, the Bellingham Trades Council,[5] subsequently began campaigns among the Company's employees. By the middle of March 1966 each of them had solicited varying numbers of signed authorization cards (Tr. 26-27, 88, 273, 557-558; G.C. Exh. 9; Inter. Exhs. 1, 3A, 4, 5, 6, 10, 13, 15, 17, 25, 26, 30, 37, 38, 39).

On March 10, 1966, the Machinists sent a letter to the Company requesting recognition and offering to prove a majority by submitting its authorization cards to a neutral third party for a card check (R. 46, 47; Tr. 37-38, 1161, 1167-1169; G.C. Exh. 2). The Company acceded to this procedure and entered into an agreement with the Machinists referring the matter to a representative from the Washington State Department of Labor and Industries (R. 47, 88; G.C. Exhs. 3, 4). The Company informed the State representative, Willard Olson, that, in addition to the Machinists, at least two other unions were then organizing, but Olson did not notify any of the other labor organizations that a card check was imminent (R. 51, 88; 1026, 1093-1094, 1097-1098).

On March 16, Olson and his assistant compared signatures on the Machinists' submitted authorization cards with signatures known to be authentic in the Company's files. Olson found, on this basis, that 81 cards were genuine. Since, in Olson's view, the Company had a representative complement of employees, 122 in number, the 81 cards were deemed to establish the majority status of the Machinists (R. 47-48, 49; G.C. Exhs. 5, 6, 7; Inter. Exh. 1). The Company then posted a notification in its plant of its recognition of the Machinists (R. 48; 315-316, 448, 488, 544-545, 581, 799-800).

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[4] Aluminum Workers International Union, AFL–CIO.

[5] Bellingham Metal Trades Council, Allied Industrial Division.

On March 18, the Aluminum Workers filed a representation petition before the Board, naming itself, the Steelworkers and the Machinists as labor organizations which had either claimed recognition from the Company, or were known by it to have a representative interest in its employees (R. 48, 49; 48; G.C. Exh. 8). Together with its petition, the Aluminum Workers filed 44 of its own authorization cards dated prior to the card check. Of these cards 30 were signed by individuals who also had signed cards for the Machinists (R. 49, 88-89; 89; G.C. Exh. 9). A provision of the Aluminum Workers' card purported to "cancel any prior authorization" (R. 49; G.C. Exh. 9). Notwithstanding the above proceedings, the Company and the Machinists, on April 14, 1966, executed a collective bargaining agreement which provided for a union security clause and dues check-off (R. 49; 177, 178; G.C. Exh. 11, p. 7 thereof).

II. THE BOARD'S CONCLUSION AND ORDER

Upon the foregoing facts, the Board found that the Company violated Section 8(a)(2) and (1) of the Act by recognizing and entering into a contract with the Machinists at a time when the Machinists did not represent a majority of the Company's employees (R. 88, 89, 52, 53). Accordingly, the Board ordered the Company to cease and desist from recognizing the Machinists and from giving effect to the contract executed with it. Affirmatively, the Board ordered the Company to withdraw and withhold all recognition from the Machinists, unless and until it is certified by the Board, to reimburse all employees for dues and other moneys extracted under the contract with the Machinists, and to post the appropriate notices (R. 89, 53-54).

ARGUMENT

I. THE BOARD PROPERLY FOUND THAT THE COMPANY VIOLATED SECTION 8(a)(2) AND (1) OF THE ACT BY RECOGNIZING AND EXECUTING A CONTRACT WITH THE MACHINISTS AT A TIME WHEN THE MACHINISTS REPRESENTED ONLY A MINORITY OF UNIT EMPLOYEES

An employer commits an unfair labor practice by granting exclusive bargaining status to and executing a contract with a union that represents only a minority of his employees. *International Ladies' Garment Workers' Union v. N.L.R.B. (Bernard-Altmann),* 366 U. S. 731 (1961); *N.L.R.B. v. Trosch,* 321 F.2d 692, 695, 696 (C.A. 4, 1963), cert. den., 375 U. S. 993 (1964). "There could be no clearer abridgment of Section 7 of the Act, assuring employees the right 'to bargain collectively through representatives of their own choosing' . . . . " *International Ladies' Garment Workers' Union, supra,* 366 U. S. at 737. Such a violation is manifest on this record.

Prior to the time the Company extended recognition to the Machinists, a substantial number of employees had signed authorization cards not only for that union but for the other unions as well (*supra,* pp. 3, 4). It is established Board law that when an employee has signed multiple union cards, none of his cards can be considered a valid designation, for it is impossible to determine which union the employee has chosen as his *exclusive* bargaining agent. *Allied Supermarkets,* 169 NLRB No. 135, 67 LRRM 1298, 1299 (1968).[6] Had the State Mediator, who knew of the

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[6] See also *J. W. Mortell Co.,* 168 NLRB No. 80, 66 LRRM 1367 (1967); *Bendix-Westinghouse Automotive Air Brake Co.,* 161 NLRB No. 73, 63 LRRM 1395, 1396-1397 (1966); *I. Posner, Inc.,* 133 NLRB 1573, 1575 (1961); *International Metal Products Co.,* 104 NLRB 1076, 1080 (1953); *Weirton Ice & Coal Supply Co.,* 103 NLRB 810, 811-812 (1953); *Harry Stein d/b/a Ace Sample Card Co.,* 46 NLRB 129, 130-131 (1942).

organizing efforts of the Steelworkers and Aluminum Workers, notified the competing unions that he was making a card check and invited them to participate in it, he would have found that 30 of the employees who designated the Machinists as their bargaining representative subsequently designated the Aluminum Workers, and revoked their previous decisions (*supra,* p. 4).[7] The Machinists thus could not be regarded as the duly designated representative of the Company's employees within the meaning of Section 9(a) of the Act. Consequently, the effect of the Company's conduct in extending recognition to the Machinists was to establish a minority union in its plant.

A. Good faith is no defense

The Company protests that it was not aware that some employees had signed more than one authorization card, and that the demand and extension of recognition were accomplished with an absence of bad faith (Co. Br. 4). But such a circumstance cannot aid the Company: "Nothing in the statutory language prescrib[es] *scienter* as an element of the unfair labor practice here involved." *International Ladies Garment Workers Union, supra,* 366 U. S. at 739. Here, as in the *Garment Workers'* case, the employer acts at his peril, for any other rule would subject employees to imposition of a bargaining agency *not* of their own choosing. Here, too, as in *Garment Workers,* "prohibited conduct cannot be excused by a showing of good faith . . . for, even if mistakenly, the employees' rights have been invaded." *Id.* at 738-739.

The Company argues that *Garment Workers* is distinguishable here because, in the instant case, the Company employed a "satisfactory", "reasonable" or "careful" method of determining majority status (Co. Br. 24). This argument fails for two separate reasons. First, the Supreme Court

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[7] The Mediator found that 81 out of 122 employees had signed cards for the Machinists (*supra,* p. 3). If, therefore, 30 of these cards are rejected, the Machinists failed to obtain a majority.

made it explicit that the degree of care exhibited by the employer is irrelevant. Noting that the employer in *Garment Workers* made "no reasonable effort to determine" the union's status, the Court stated that this was "*of no significance to our holding*". *Id.* at 739, n. 11 (emphasis supplied.) Second, *Garment Workers* hardly suggests that the Company's conduct here was satisfactory or reasonable in any event. It is true that the Court found it less than an "onerous burden" for employers to cross-check their records with union listings or cards. But nothing in *Garment Workers* implies that an employer would be behaving reasonably if he checked the cards of only one union in a rival union situation. Accordingly, even if some exception to the *Garment Workers* rule were to be created exonerating an employer's recognition of a minority union, the facts of this case do not present a situation which invites such a result.

To support its contrary position, the Company (Br. 13) cites *West Indian Co., Ltd.*, 129 NLRB 1203 (1961), for the proposition that state labor agency determinations have previously been given binding effect by the Board. Therefore, the Company argues, the Board should defer to the State's determination, despite its discrepancies, thus sanctioning the Company's recognition of the Machinists. But *West Indian* involved a secret ballot election in which the employees were "given an opportunity to express their true desires as to a collective bargaining agent, and [which] was not attended by irregularities". 129 NLRB 1204. In those circumstances, the Board held that full effect would be given to the State certification and that the employer could not properly insist upon a subsequent Board election.[8]

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[8] See *Retail Clerks Local No. 1179 v. N.L.R.B.*, 376 F.2d 186, 190 (C.A. 9, 1967):

> ". . . unless an employer was motivated by a good faith doubt that the union represented a majority of the employees, it was an unfair labor practice for the employer to demand a Board election before negotiating with the union."

In the instant case, however, there was no election at all; *West Indian* and other related cases relied upon by the Company (Br. 13) are therefore inapplicable. Moreover, the card check conducted was attended by such an irregularity – the exclusion of competing unions – that it obviously constitutes an inadequate procedure and fails to satisfy the minimal standards of trustworthiness referred to in *West Indian* in connection with elections. For example, the Board has never held that *West Indian* would apply to a state election in which only one of several competing unions was allowed on the ballot. The State card check in this case suffers from analogous defects.

Accordingly, this case does not fairly present the question posed by the Company: whether the Board should refrain from re-examining the Machinists' claim of majority status, and from applying *Garment Workers,* because of the desirability of giving binding effect to a state agency's determination of majority status. That determination, in the Board's view, was characterized by a substantial deviation from fundamental requirements of fairness, and does not invite Board sanction. As the Board here explained:

> "In these circumstances, we agree with the Trial Examiner that at the time of recognition a question concerning representation existed and that the investigation and resolution of that question was not attended by appropriate safeguards, and we find that Respondent acted at its peril . . . (R. 88).

B. Arguments against the Midwest Piping doctrine are misplaced

The Company argues at length (Br. 8-14) that the *Midwest Piping* rule (*Midwest Piping & Supply Co.,* 63 NLRB 1060 (1945)) is inapplicable here. But the Board did not refer to that doctrine, either in terms or by case citation. Nor did the Board find that there were competing claims

for recognition at the time the Company acted, a finding that traditionally has constituted the prerequisite for a *Midwest Piping* application. See *Retail Clerks Local 770 v. N.L.R.B.*, 370 F.2d 205, 207 (C.A. 9, 1966).

The sole expressed basis for the Company's claim that the Board here invoked *Midwest Piping* consists in the fact that the Board's decision contains the statement that appropriate safeguards were not employed in resolving the question of representation (Co. Br. 8). But as we have already shown, *infra*, pp. 7-8, this Board finding was appropriate to distinguish the instant case from *West Indian, supra,* and others where state action was given final binding effect. No reason exists therefore, to infer a *Midwest Piping* case from this language, except to create a vulnerable target for Company counsel.

C. Other cases cited by the Company are inapplicable

The other cases relied upon by the Company are inapplicable because they did not involve minority unions. *Snow v. N.L.R.B.*, 308 F.2d 687 (C.A. 9, 1962); and *Retail Clerks Union Local 1179 v. N.L.R.B.*, 376 F.2d 186 (C.A. 9, 1967) discuss an employer's obligations under Section 8(a)(5) of the Act and the conditions under which he may lawfully decline to bargain with a *majority* union. The instant case, however, involves the employer's duty under Section 8(a)(2) to refrain from recognizing a *minority* union. The act of recognition, no matter how well motivated, violates employee rights unless the union in fact has the support of a majority of the employees; and a mere "good faith" belief on the employer's part cannot supply that majority if it does not exist. *Garment Workers, supra.*

That "good faith doubt" creates a defense in Section 8(a)(5) cases, while "good faith belief" is *no* defense in Section 8(a)(2) cases does not,

as the Company argues (Br. 16), offend "fundamental fairness". Where the factual circumstances confirm or support the Union's truthful claim of a majority, an employer must recognize the union to avoid a Section 8(a)(5) charge; where the circumstances genuinely cast doubt upon its claim the employer must refrain pursuant to Section 8(a)(2). But in each case, as the Supreme Court pointed out in *Garment Workers,* it will not be an "onerous burden" for the employer to take the steps appropriate to confirm the union's claim or find it doubtful. Plainly, those minimal steps were not taken here: the Company relied on a procedure which failed to provide for the participation of the competing unions and which consequently failed to check for the revocations and duplications which had occurred.

II. THE BOARD'S REIMBURSEMENT ORDER IS VALID AND PROPER

Under Section 10(c) of the Act, the Board "is charged with an extremely broad latitude in fashioning remedies to effectuate the purposes of the Act as a whole. [citation omitted] Whenever possible the Board's order 'should stand unless it can be shown that the order is a patent attempt to achieve ends other than those which can fairly be said to effectuate the policies of the Act'." *N.L.R.B. v. Seine & Line Fishermen's Union (Paul Biazevich),* 374 F.2d 974, 982-983 (C.A. 9, 1967), cert. den., 389 U.S. 913, quoting *Virginia Electric & Power Co. v. N.L.R.B.,* 319 U.S. 533, 540 (1943). Because of the union-security and dues checkoff provisions in the contract between the Company and the Machinists (*supra,* p. 4), the Company's employees were compelled, as the price of keeping their jobs, to join and pay dues and fees to the Machinists. Since, as we have shown above, these contractual obligations were unlawfully imposed, the Board should clearly

be entitled to compel their undoing. Similarly, that aspect of the Board's order which requires repayment of the sums unlawfully exacted from the employees pursuant to the contract is a wholly appropriate remedy for the unfair labor practice committed by the Company. *Virginia Electric & Power Co. v. N.L.R.B.*, 319 U. S. 533 (1943); *Dixie Bedding Mfg. Co. v. N.L.R.B.*, 268 F.2d 901, 907 (C.A. 5, 1959); *Local Lodge 1424, IAM v. N.L.R.B.*, 264 F.2d 575, 582 (C.A.D.C., 1959), *rev'd on other grounds,* 362 U.S. 411 (1960); *N.L.R.B. v. Downtown Bakery Corp.*, 330 F.2d 921, 928 (C.A. 6, 1964); *N.L.R.B. v. Spiewak,* 179 F.2d 695, 698 (C.A. 3, 1950); *Revere Copper & Brass, Inc. v. N.L.R.B.*, 324 F.2d 132, 137 (C.A. 7, 1963); *N.L.R.B. v. Local 294, IBT, etc.,* 279 F.2d 83, 87-88 (C.A. 2, 1960), cert. den., 364 U.S. 894 (1960); *N.L.R.B. v. Burke Oldsmobile, Inc.*, 288 F.2d 14, 16-17 (C.A. 2, 1961).[9]

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[9] To the extent that *Hughes & Hatcher, Inc. v. N.L.R.B.,* 393 F.2d 557, (C.A. 6, 1968) finds "no reason" for an employer to make reimbursement when it acted "merely as a conduit" for the dues, the decision is erroneous. See *Virginia Electric, supra,* 319 U.S. 542-544.

Nor may the Company argue that *Garment Workers* demonstrates Supreme Court disapproval for such a remedy, thus, in effect, overruling *Virginia Electric*. In fact, reimbursement was not an issue in *Garment Workers*, because the Board did not direct such a remedy there.

CONCLUSION

For the foregoing reasons, we respectfully submit that the petition to review should be denied and that a decree should issue enforcing the Board's order in full.

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